414 Nicollet Mall
Minneapolis, MN 55401

March 10, 2022

PUBLIC DOCUMENT –
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—Via Electronic Filing—

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

RE: IN THE MATTER OF A FORMAL COMPLAINT AND REQUEST FOR EXPEDITED RELIEF BY SUNSHARE, LLC AGAINST NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY (PETITION FOR VARIANCE ON VOS RATE SCHEDULE TO BE APPLIED TO FIVE PROJECTS)
DOCKET NOS. E002/C-21-125

Dear Mr. Seuffert:

Northern States Power Company, doing business as Xcel Energy, submits to the Minnesota Public Utilities Commission its attached Answer to the Petition filed in this docket.

Certain information in this filing has been marked as Not Public Protected Data. Some of this is information that Sunrise may consider to be its Not Public Protected Data. Other information has been designated as Not Public Protected Data of Xcel Energy because this data is classified as trade secret pursuant to Minn. Stat. §13.37, subd. 1(b). This information derives independent economic value from not being generally known or readily ascertainable by others who could obtain a financial advantage from its use.

We have electronically filed this document with the Minnesota Public Utilities Commission, and copies have been served on the parties on the attached service list. Please contact Jessica Peterson at jessica.k.peterson@xcelenergy or (612)330-6850 if you have any questions regarding this filing.

Sincerely,

/s/
JAMES DENNISTON
ASSISTANT GENERAL COUNSEL

Enclosures
c: Service List

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STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben	Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
Joseph Sullivan	Commissioner
John A. Tuma	Commissioner

IN THE MATTER OF A FORMAL COMPLAINT AND REQUEST FOR EXPEDITED RELIEF BY SUNSHARE, LLC AGAINST NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY (PETITION FOR A VARIANCE FROM XCEL ENERGY TARIFF)	DOCKET NO. E002/C-21-125 **ANSWER TO PETITION FOR VARIANCE**

INTRODUCTION

Northern States Power Company, doing business as Xcel Energy (Company), submits this Answer pursuant to the Commission's February 18, 2022 Notice of Answer and Comment Period on the Petition for a Variance on the VOS Vintage Year Bill Credit Rate to be applied for the SunShare OsterSun, CleodSun, GraniteSun, QuarrySun and SinclairSun projects (Petition).

SunShare's Petition requests that the Commission grant a variance under Minn. R. 7829.3200 to the applicable Value of Solar (VOS) Bill Credit Rate for these five projects. Instead of the 2019 vintage year rate applicable by the tariff provisions, SunShare is asking that a higher 2020 vintage year rate be applied. However, the VOS rate specified in our tariff is not a Commission rule and therefore Minn. R. 7829.3200 does not apply, absent special circumstances, which SunShare has not identified. Furthermore, as we discuss in more detail below in this Answer, SunShare has not met the elements required in Minn. R. 7829.3200 for granting a variance. We recommend that the Commission dismiss the Petition.

I. BACKGROUND

In its Petition, SunShare seeks to alter the applicable Value of Solar (VOS) Bill Credit Rate for five of its projects: OsterSun, CleodSun, GraniteSun, QuarrySun and SinclairSun. The 2019 VOS Vintage Year VOS Bill Credit Rate applies to each of these projects pursuant to the Community Solar Garden (CSG) tariff which provides that the specific year vintage VOS to be applied is the most recently approved VOS Vintage Year Bill Credit Rate at the time each interconnection application is Deemed Complete (tariff sheet 9-64.1). SunShare requests that the tariff provisions not be followed, and that instead the 2020 VOS Vintage Year Bill Credit Rate should be applied. The 2019 VOS Vintage Year Bill Credit Rate has a levelized value of $0.1109 / kWh, compared to the 2020 VOS Vintage Year Bill Credit Rate which has a levelized value of $0.1152 / kWh, a difference of $0.0043 / kWh from the levelized 2019 rate.

The Petition seeks a variance to this CSG tariff provision due to the following alleged delays in Xcel Energy tendering Interconnection Agreements (IAs) for each of these projects: OsterSun (147 calendar days), CleodSun (50 calendar days), GraniteSun (109 calendar days), QuarrySun (43 calendar days) and SinclairSun (39 calendar days).[1] For OsterSun and CleodSun, this is the second time SunShare is seeking compensatory damages on this issue at the Commission.

For OsterSun, SunShare filed its original Complaint in Docket No. 21-125 on February 11, 2021 and sought various types of relief, including in pars. 44 – 48, a variance to the tariff to provide SunShare OsterSun project an adder to the VOS Bill Credit Rate. The adder was marked as non-public in the amount of **[PROTECTED DATA BEGINS PROTECTED DATA ENDS]**. SunShare asked that the Commission stay the proceeding and subsequently filed an Amended Complaint on May 28, 2021 (a delay of 106 days from the date of filing of the original complaint). The Amended Complaint similarly in pars. 63 - 67 sought a variance to the tariff to provide SunShare a VOS adder in the non-public amount of **[PROTECTED DATA BEGINS PROTECTED DATA ENDS]**. At the Commission's August 12, 2021 hearing the Commission did not provide the additional compensation that SunShare requested. At this hearing, on this issue Commissioner Tuma stated the SunShare request would involve a tariff change, which he did not support in this type of proceeding:

[1] In the Matter of the Formal Complaint and Request for Expediated Relief by SunShare, LLC Against Northern States Power d/b/a Xcel Energy regarding OsterSun Project, SunShare LLC, Docket No. E002/C-21-125, January 30, 2022.

> **Commissioner Tuma (beginning at about 2:18:29):** And, Madam Chair, just to the company I'm looking at the relief sought, and I don't know where my fellow commissioners are going to do today, but I can tell you I'm not very inclined to go down the road of the decision options with regards to doing an adder coming out of a specific complaint. That is a tariff change. I think that is a whole different process, so I am not at all inclined to go there.

On this issue Commissioner Schuerger stated that he did not believe that the Commission has authority to award compensatory damages:

> **Commissioner Schuerger (beginning at about 2:32:16):** I tend broadly to agree with what I think I heard of the perspective of my colleague Commissioner Tuma here, and I would say from this Commissioner's perspective as I review the evidence here and as I review carefully the statute and law, I don't believe that we actually have authority in this case for compensatory damages or other - the second or third remedy. That isn't necessarily a decision before us today, but I don't see that as within our statutory jurisdiction.

For CleodSun, SunShare filed its original Complaint in Docket No. 21-126 on February 11, 2021 and similarly sought various types of relief, including a request in pars. 39 – 43 for a variance to the tariff to provide SunShare CleodSun the same VOS adder as requested in the OsterSun Complaint.[2] Again, SunShare asked that the Commission stay the proceeding and subsequently filed on May 28, 2021 an Amended Complaint, which revised its proposed adder to be the same as in the Amended OsterSun Complaint. This matter was also addressed at the Commission's August 12, 2021 agenda meeting, right after the hearing on OsterSun in Docket No. 21-125. For CleodSun, the Commissioners remained consistent with the position they took on OsterSun and did not approve the additional compensation that SunShare requested.

For GraniteSun, QuarrySun, and SinclairSun, SunShare took a significant amount of time to sign and executive the IA. Table 1 below identifies when SunShare signed IA's and fully executed and fund these agreements.

[2] Xcel Energy filed Comments regarding OsterSun on June 23, 2021, Docket No. E002/C-21-125, and do not reiterate those Comments here. We note that the Company does not agree with the timeframes outlined in the Amended Complaint and that the IA was signed by SunShare and payment completed on March 3, 2022.

Table 1

Project	Alleged Number of Days Delay to offer IA	Date IA offered	Date SunShare Signed IA	Cost Estimate Paid	Number of days it took for SunShare to execute and fund the IA
GraniteSun	109	12/16/19	2/11/21	2/12/21	424
QuarrySun	43	10/11/19	10/16/19	2/12/21	490
SinclairSun	39	10/7/19	2/11/21	2/12/21	494

In par. 60 of the Petition, SunShare alleges that pursuant to the terms of the confidential Partial Settlement Agreement, SunShare could file a request with the Commission to change the applicable VOS rate. This Partial Settlement Agreement was filed in this docket on December 21, 2021. What SunShare fails to state in its Petition is that Xcel Energy has also reserved its rights to oppose any such request.

Additionally, congested queues and re-studies for queue or technology changes also lead to delays that impact a wide variety of projects. Delays are not unique to SunShare or these projects.

With this as background, we provide below further discussion and response to the Petition.

II. DISCUSSION

Similar to how the Commission previously did not approve SunShare's request for the VOS adder for the OsterSun and CleodSun projects, it should reject the higher VOS rates being requested here for all of the projects that are subject to the Petition. The only relief requested in the Petition is the application of the 2020 VOS Vintage Year Bill Credit Rate table for these projects. SunShare's Petition seeks relief that is not appropriate and should be denied.

A. SunShare's Request Should Have Been Filed in Docket No. 13-867

We believe that any request seeking to reopen the CSG tariff (which includes how the VOS Vintage Year Bill Credit Rates are applied) should be brought in the CSG docket, not in the present docket. The present docket has a very limited-service list – consisting of Xcel Energy, SunShare, OAG, Department of Commerce, Commission and Pivot Energy. The CSG docket, on the other hand, is much more robust and includes the names of many CSG developers and other interested parties. Also, the CSG tariff was developed and approved by Commission orders in the CSG docket, which is still open and active.

In par. 54 of the Petition, SunShare points to the applicable tariff provision being on tariff sheet 9-64.1a, which states:

> Each application Deemed Complete in a given calendar year will have a VOS Bill Credit Rate table applicable to the vintage of the VOS based on the calendar year it was Deemed Complete ("VOS Vintage Year"). In the event a VOS Vintage Year Bill Credit Rate table is not approved for part or all of a given calendar year, the most recently approved VOS Vintage Year Bill Credit Rate table will apply to applications Deemed Complete in that calendar year until a new VOS Vintage Year Bill Credit Rate table becomes effective.

Complementary language is also on tariff sheet 9-64.102 describing which applications are subject to the 2019 VOS Vintage Year Bill Credit Rate:

> The table below shows the 2019 VOS Vintage Year Bill Credit Rates. These are applicable to applications Deemed Complete from March 26, 2019 until the 2020 VOS Vintage Year Bill Credit Rate table is effective.

The above language from Sheet 9-64.1a was authorized by the Commission's May 9, 2019 Order in Docket No. 13-867, and the Company filed its compliance tariffs in that docket on May 20, 2019. The above language from Sheet 9-64.102 was authorized by the Commission's March 22, 2019 Order in Docket No. 13-867, and the Company filed its compliance tariffs in that docket on March 26, 2019. Further, the SunShare Petition has not even sought to reopen or variance for the provisions of tariff sheet 9-64.102.

SunShare (in pars. 61 through 64, and also on pages 1 and 3 and footnote 7of its Petition) is basing its request on seeking to reopen the CSG tariff under Minn. Stat. §216B.25, and also on seeking a variance to the CSG tariff under Minn. R. 7829.3200. Minn. Stat. §216B.25 states:

> **Further Action on Previous Order.**
> The commission may at any time, on its own motion or upon motion of an interested party, and upon notice to the public utility and after opportunity to be heard, rescind, alter, or amend any order fixing rates, tolls, charges, or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order therein, for the taking of further evidence or for any other reason. Any order rescinding, altering, amending, or reopening a prior order shall have the same effect as an original order.

The orders that SunShare seeks to reopen were issued in Docket No. 13-867. Accordingly, to the extent that SunShare is seeking to reopen the CSG tariff and modify the tariff, the request to reopen should also have been filed in that same docket.

B. SunShare Has Not Met the Requirements for a Variance

Additionally, the Petition has not fulfilled the requirements for a variance under Minn. R. 7829.3200. This rule states:

> **7829.3200 OTHER VARIANCES.**
> Subpart 1. **When granted**. The commission shall grant a variance to its rules when it determines that the following requirements are met:
> A. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
> B. granting the variance would not adversely affect the public interest; and
> C. granting the variance would not conflict with standards imposed by law.
>
> Subp. 2. **Conditions.** A variance may be granted contingent upon compliance with conditions imposed by the commission.
>
> Subp. 3. **Duration.** Unless the commission orders otherwise, variances automatically expire in one year. They may be revoked sooner due to changes in circumstances or due to failure to comply with requirements imposed as a condition of receiving a variance.

The VOS rate in our tariff, however, is not a Commission rule and therefore Minn. R. 7829.3200 does not apply, in the absence of special circumstances, which SunShare

has not explained. But, even if Minn. R. 7829.3200 were to apply to the requested waiver of the VOS tariffed rate, SunShare has not met the required elements as discussed below.

1. *SunShare has failed to show that enforcement of the CSG tariff provision applying the 2019 VOS Vintage Year Bill Credit Rate table would impose an excessive burden upon the SunShare or others affected by the tariff. (Minn. R. 7829.3200, Subp. 1A).*

There is no excessive burden to SunShare from receiving the 2019 VOS Vintage Year Bill Credit Rates for these projects. This is a rate that is well above market rate and avoided cost rate for the production of solar electricity. Also, many other DER and CSG projects have been delayed in receiving their IAs, and there is no unique burden on SunShare. Further, SunShare's claims of being harmed by missing the 2019 ITC appear to be exaggerated, and SunShare itself has contributed to more delays in signing the IAs once offered than they allege Xcel Energy was late in tendering the IAs to SunShare.

While there was some delay in offering the IAs to SunShare, we do not believe this delay is a cause in fact of any injury to SunShare. This is because SunShare has not been ready, willing and able to sign and fund the IAs timely. The Commission has previously applied the common "ready, willing and able" standard to determine if a legally enforceable obligation (LEO) has been created in the interconnection context.[3] Here, the fact is that SunShare had not been ready, willing, and able to sign and fund the IAs for a significant length of time, as shown in Table 1 above. This same issue was previously addressed in SunShare's prior requests for additional compensation for the OsterSun and CleodSun projects. Given the delays caused by SunShare itself in signing the IAs, our delay in offering the IAs to SunShare by some number of days is irrelevant to any SunShare claimed harm of missing the 2019 ITC.

SunShare's claim that it would have been eligible for the 2019 ITC but failed to qualify due to Xcel Energy's delays, moreover, appears to be questionable. SunShare claims that it was not eligible for the 2019 ITC because Xcel Energy did not offer the IAs in 2019. To our knowledge, there is no requirement that a project needs to be offered an IA in 2019 in order to be eligible for the 2019 ITC. Based on our general understanding of this law, all that is needed is at least 5 percent of the costs of the project have been incurred in 2019 and that the project be placed in service within 4

[3] See, for example, *Petition by Highwater Wind LLC and Gadwall Wind LLC*, Docket No. E015/CG-11-1073, ORDER DENYING CLAIM OF LEGALLY ENFORCEABLE OBLIGATION at 8 (Feb. 25, 2013).

years from the beginning. For example, SunShare could have ordered and paid for a sufficient number of panels for these projects in 2019 to cover at least 5 percent of the overall project costs and would have preserved its eligibility for the 2019 ITC. Further, since SunShare has many pending applications across many subsidiaries, it is our understanding that the panels it purchased under the 2019 ITC could be shared across several projects, so even if an intended project did not go forward it could repurpose those panels to other projects. Based on this, it appears that SunShare could have still preserved its ability to obtain the 2019 ITC but failed to take prudent measures to mitigate or eliminate its alleged losses.

As noted above and below, however, we do not believe that the Commission needs to assess this question as there is no legal basis for awarding SunShare any compensatory damages. We discuss this ITC issue only as background information regarding the allegations in the Petition. However, if the Commission determines that it can and should consider the SunShare request, SunShare has not provided any financial, construction or other information to support its claim of financial harm. In order to respond to SunShare's claim, we would need to issue discovery, vet SunShare's financial, construction or information, and make revenue comparisons under the different VOS rate. All this would require SunShare's full cooperation and sufficient time; we may also need to retain an outside consultant to assist in the financial or other analysis.

In addition, we note that various other matters were already addressed and resolved in the confidential Partial Settlement Agreement and this is part of the larger context here.

2. *SunShare has failed to show that granting the variance would not adversely affect the public interest. (Minn. R. 7829.3200, Subp. 1B).*

Even if the Commission would be considered to have authority to award SunShare its requested variance, doing so would not be in the public interest for several reasons. Granting the higher VOS Bill Credit Rate would result in an even larger subsidy to the CSG program, paid through fuel clause costs by Xcel Energy retail customers. Granting the request would also amount to discrimination against other developers who have experienced interconnection delays. Additionally, as we discuss below, the example from Colorado that SunShare cites is inapplicable; the Commission has already assessed a $1 million underperformance payment against Xcel Energy for delays during this time period; and the Commission has no general authority to grant equitable relief.

a. The High CSG Subsidy Should Not be Increased.

The CSG program is already highly subsidized and granting the variance would only increase this amount paid by Xcel Energy customers through the fuel clause. By the end of 2021, the Company paid out over half a billion dollars in Bill Credits to CSG subscribers in Minnesota. Over the next twenty to twenty-five years, the overall cost of this program in Bill Credits is expected to grow far above $2 billion. All of these costs flow through the fuel clause, and the vast majority are paid for by Minnesota retail customers as an additional cost included in their retail electric bills. Minnesota customers bear the cost of the program, in that all Bill Credit costs above MISO's LMP market are recovered from Minnesota customers. Other fuel costs are assigned to each jurisdiction based on the ratio of that jurisdiction's sales levels. For CSG Bill Credits, the costs at LMP market value are assigned to each jurisdiction based on sales ratios, and all Bill Credit costs above that are recovered from Minnesota customers. In 2020, Minnesota customers paid $146 million for the CSG program, including $130 million in costs above the MISO LMP market price. In 2021, the energy produced by CSGs accounted for about 3.5 percent of all energy produced for Xcel Energy in Minnesota, but the CSG Bill Credits accounted for about 20 percent of the overall cost of the fuel clause to our customers. The CSG "Value of Solar" or "VOS" rates are in the range of about 2 to 2.5 times higher than solar PPA rates, and the CSG "Applicable Retail Rate" or "ARR" Bill Credit Rate is even higher than this.

The Commission should not increase the amount of the subsidy already being provided. Further, under Minn. Stat. §216B.03, "Any doubt as to reasonableness should be resolved in favor of the consumer." Here, the VOS Bill Credits are paid by our retail customers, and disproportionately paid by our consumer retail customers. It would not be in the public interest to increase their cost burden by granting the variance.

b. Providing the Requested Relief Would Amount to Discrimination

We believe that providing the requested relief to SunShare would give it a competitive advantage compared to other developers who have experienced delays in receiving IAs, for example, because of the current serial review process. Granting the relief would violate principles of non-discrimination.

c. SunShare's Reference to an Adder Ordered in Colorado is Inapplicable

In par. 70, SunShare alleges that "The Colorado Public Utilities Commission recently awarded SunShare an adder to compensate it for the additional costs it incurred as a

result of Xcel's delay interconnecting community solar garden projects in Colorado." Notwithstanding that decisions from Colorado are not precedential in Minnesota, SunShare misconstrues the cited Order and fails to place it in proper context. We attached as Attachment D to our June 23, 2021 Comments the February 25, 2021 Public Utilities Commission of Colorado Order in *In the Matter of Verified Petition of SunShare LLC for a Declaratory Order Approving a Renewable Energy Credit Adder*, Proceeding No. 20D-0262E.

In Colorado, there is a bidding process to determine which proposed community solar gardens will be accepted, and only projects with winning bids move forward. SunShare had won the bidding process for several of its gardens. Because there is a separate fund for payment for the gardens (RESA), as noted in par. 11 of the Colorado Order, the winning bids submitted by SunShare were at a rate of $0 or negative amounts. After the bids were accepted, engineering studies began on the proposed project locations and these determined that there was no capacity at the locations that SunShare submitted - a new situation not previously encountered in Colorado. As a result, the Company allowed SunShare to submit new interconnection applications at new locations, which resulted in a delay in the proposed timeline to interconnect the gardens and caused additional expense to SunShare beyond what had been anticipated in its bids.

As noted in par. 39 of the Colorado Order, the bidding process allows the price paid for RECs to be reformed for viable projects, and the Colorado Order reset the winning bidding price to reflect the lowest amount needed in order to continue to allow the five projects at issue to remain as viable projects. This adder is to be paid for by ratepayers. Par. 44 of the Colorado Order notes that if this adder were not to be granted, then nearly 80% of the awarded capacity for the 2018 program year would be withdrawn, up from the 50% withdrawal rate that would remain if these SunShare projects were not to be withdrawn. As a result, the rate adder awarded in the Colorado is consistent with Colorado law in a way that SunShare's proposed adder in this case is not consistent with Minnesota law, and the Commission should ignore the Colorado Order because it is irrelevant.

d. The Commission Has Already Triggered QSP Underperformance Payment for Interconnection Delays in 2019

The Commission has already required a Quality of Service Plan (QSP) underperformance payment of $1 million from the Company for interconnection delays and other service issues in 2019 and should not provide SunShare relief due to the imposition of this QSP underperformance payment. On January 21, 2021 the

Commission deliberated and voted in Docket Nos. E,G002/CI-02-2034 and E,G002/M-12-383, *In the Matter of the Petition of Northern States Power Company d/b/a Xcel Energy for Approval of Amendments to its Natural Gas and Electric Service Quality Tariffs Originally Established in Docket No. E,G-02/CI-02-2034 and Investigation and Audit of Service Quality Reporting-Fraudwise Report*, where it imposed a $1 million underperformance payment under the provisions of the Xcel Energy QSP tariff, driven in part by complaints related to solar interconnection applications in 2019.

We note that the industry group MnSEIA, in the Solar Garden Docket No. 13-867, had filed comments in the later part of 2020 to argue for delayed implementation of the Company proposed 2021 VOS rate (levelized at about $0.1104/kWh) as a way to compensate solar developers for delays in Xcel Energy's processing of interconnection applications in 2019. (See, MnSEIA's November 18, 2020 comments in that docket, at pages 10-11.) However, at the Commission's January 28, 2021 hearing on that matter, MnSEIA backed off of its position and appeared to accept the Commission's vote of January 21, 2021 to impose a $1 million underperformance payment on the Company per the terms of the Company's QSP tariff as resolving the issue on delays in the interconnection process. The briefing papers for the Commission's January 28, 2021 agenda meeting in Docket No. 13-867 on the 2021 Value of Solar rate, at page 47, stated:

> **Xcel's delayed interconnection process**
> 1. Take no action at this time in response to MnSEIA's request for a delay in the adoption of the 2021 VOS as a penalty to Xcel for delayed interconnections. (Xcel Energy)
> 2. Direct Xcel to delay the effective date of the 2021 VOS until such time as the Company's Interconnection process is fixed and the Company is meeting MNDIP-tariffed timelines. (MnSEIA)

At the January 28, 2021 hearing, David Shaffer on behalf of MnSEIA supported Decision Option 1 above, and in doing so stated the following:

> ...(beginning at about 48:25) Under the Xcel delay header, given the work that the Commission did last week, we suggest 1.

Because of this, the Commission has essentially already taken action to account for any alleged delays applicable in the timeframe in which SunShare claims it should have received an IA 2019.

e. The Commission Has No General Authority to Grant Equitable Relief

In par. 73, SunShare alleges that the Commission has the power to grant equitable relief. The Commission, being established by statute, has only those powers given to it by the legislature. *Great Northern Railway Co. v. Public Service Commission*, 284 Minn. 217, 220, 169 NW2d 732, 735 (1969). "Although the statutes involved here are replete with references to words 'fair,' 'just,' and 'reasonable,' nothing in the statutory scheme suggests that the Commission may act as a court of equity...." *In the Matter of New Ulm Telecom*, 399 NW2d 111, 122 (Mn. Ct. App. 1987). Any "equitable powers" of the Commission must be found in the context of its statutory authority. *Senior Citizens Coalition v. Minnesota Public Utilities Commission*, 355 NW2d 295, 305 (Minn. 1984). In the words of the Commission, "The statute itself does not give the Commission the general power of an equity court." (September 1984 Appellate Brief of the Commission in the New Ulm appeal referenced above, at p. 13, accessible on e-dockets under Docket No. 84-334). "The Commission remains a creature of statute. It presides over an ongoing, intricate regulatory process with duties prescribed by the legislature in considerable detail and where the legislature has generally required the agency to act prospectively." *Peoples Natural Gas v. Minnesota Public Utilities Commission*, 369 NW2d 530535-536 (Minn. 1985). As explained by the Minnesota Supreme Court, "Historically, we have been reluctant to find implied statutory authority in the context of the MPUC's remedial power. As a general rule, we resolve any doubt about the existence of an agency's authority against the exercise of such authority." *In re Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246 at 259 (Minn. 2005). Consistent with this, as explained below, the Commission has no power to award compensatory damages.

3. SunShare has failed to show that granting the variance would not conflict with standards imposed by law. (Minn. R. 7829.3200, Subp. 1C).

SunShare's request in the Petition is for a higher level of Bill Credit rate than our tariff allows for these projects, which essentially means that SunShare is asking the Commission to award compensatory damages to SunShare for the alleged violation of the interconnection tariff. The Commission has no authority to award compensatory damages, and the SunShare request has no support in laws, rules or tariff as explained further below.

a. The Commission Has No Authority to Award Compensatory Damages

This point was recognized by Commissioner Schuerger at the August 12, 2021 hearing referenced above on the SunShare prior request for compensation for the OsterSun project. The Minnesota Supreme Court has consistently determined that the Commission lacks authority to award compensatory damages. The Commission's authority is limited to that expressly given by the legislature or that which can be fairly drawn and is fairly evident from the agency objectives and powers expressly given by the legislature. *In the Matter of Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. S.Ct. 2005). And while "[t]he MPUC enjoys broad power to ascertain and fix just and reasonable policies for all public utilities…, the power to award monetary damages to a complaining party is not one that the MPUC enjoys." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 277–78 (Minn. S.Ct. 2011) (citing *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985). *Siewert* specifically cited to Minn. Stat. § 216A.05 as showing that the Commission has "no power to award damages...." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, at 285.

Consistent with this analysis in *Siewert*, in the analogous case of interconnections of wholesale customers in the telecom arena, the Minnesota Supreme Court held in *Qwest* that the Commission does not have authority to order or establish payments for failure of the utility to comply with interconnection standards, called wholesale service quality standards in that proceeding. Although related to the Commission's authority over telecom rather than electric utilities, the reasoning underlying the decision applies equally to both industries. The basis for the court's decision in *Qwest* is that the Commission has limited authority, only having the authority given to it by statute. While the state statutes give the Commission a broad general grant of authority, such as Minn. Stat. § 216A.05, nowhere does the statutory scheme expressly give to the Commission the power to provide remedies for failures to meet the interconnection standards. Since the power to impose payments for violation of interconnection standards was not expressly given by the legislature, the Commission has no such power. *Qwest,* 702 NW2d at 259-261. Similarly, here, the legislature has not granted the Commission the authority to award damages for alleged violations of the interconnection tariff, and therefore the Commission may not award such damages. This is particularly the case for electrical interconnection issues because the state statute that addresses electrical interconnection and specifically authorizes the Commission to develop incentives to the utility based on the utility's performance in encouraging residential and small business customers to participate in on-site generation (Minn. Stat. § 216B.1611, subd. 2(b)), but has no provision authorizing the Commission to order remedies where the interconnection standards have not been met.

b. An Award of Damages by Applying a Higher VOS Rate Would Be Inconsistent with the Filed Rate Doctrine

In addition to the Commission's general lack of authority to award damages (including damages in the form of changing the applicable VOS rate), awarding damages here would violate the filed-rate doctrine, which precludes a litigated claim for monetary damages for violation of a tariff such as alleged here. As recognized in *Siewert*, the filed rate doctrine is a judicially created doctrine that prevents courts from adjudicating private claims that would effectively vary or enlarge rates changed under a published tariff. This bars both direct and indirect challenges to rates in a tariff (such as SunShare's claims to compensation for alleged violations of the interconnection tariff in this case where the tariff does not provide for compensation), and prohibits a court from expanding, or adding terms, to what is provided in a tariff. *Siewert*, 793 N.W.2d 272, 285. "...[T]he filed-rate doctrine bars claims for money damages to remedy breach of a provision in an agency-approved tariff." *Hoffman v. Northern States Power Company*, 764 N.W.2d 34, 46 (Mn S.Ct. 2009), citing several cases.

The filed-rate doctrine is consistent with the state statutory scheme that prohibits providing any different compensation than set forth in tariff and prohibits granting any unreasonable preference or advantage to any person.

> **Minn. Stat. §216B.06 Receiving Different Compensation**.
>
> No public utility shall directly or indirectly, by any device whatsoever, or in any manner, charge, demand, collect, or receive from any person a ***greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedules of rates of the public utility applicable thereto*** when filed in the manner provided in Laws 1974, chapter 429, nor shall any person knowingly receive or accept any service from a public utility for a compensation ***greater or less than that prescribed in the schedules***, provided that all rates being charged and collected by a public utility upon January 1, 1975, may be continued until schedules are filed.
>
> (Emphasis added.)

Minn. Stat. §216B.07 Rate Preference Prohibited.

> No public utility shall, as to rates or service, make or grant ***any unreasonable preference or advantage*** to any person or subject any person to any unreasonable prejudice or disadvantage.
>
> (Emphasis added.)

The filed-rate doctrine avoids retroactive relief that would lead to discrimination in rates that would put a victorious plaintiff in a better position than other customers and avoids undermining the legislative scheme of uniform rate regulation. *Schermer v State Farm*, 702 N.W.2d 898, 906 (Minn. Ct.App. 2005), aff'd, 721 N.W.2d 307 (Minn. S.Ct. 2006). Were there any monetary consequence for violation of a tariff, the tariff would first need to be revised to allow for this, and the changed tariff would only have prospective effect. Otherwise, this would violate the bar against retroactive ratemaking. As stated by the Minnesota Supreme Court, "Ratemaking is a quasi-legislative function [(citation omitted)], and legislation operates prospectively. Indeed, the Public Utility Act expressly prohibits retroactive ratemaking. Minn.Stat. §216B.23, subd 1 (1984) provides: '[T]he commission shall *** by order fix reasonable rates *** *to be imposed, observed and followed in the future*.' (Emphasis added.)" *Peoples Natural Gas v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 533 (Minn. 1985).

This doctrine also is consistent with the court's reasoning in the *Siewert* case that the Commission must consider the right of a utility and its investors to a reasonable return while at the same time establishing a rate for consumers which reflects the cost of service rendered plus a reasonable profit to the utility. *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 277–78. In other words, a utility's tariffs are structured to offer it the prospect of earning its authorized return. And where those tariffs do not include provisions authorizing an award of compensatory damages, then – even if the Commission had authority from the legislature to assess such damages – it would not be proper to do so because it would deprive the utility of its opportunity to earn its authorized return. Related to this, the Minnesota Court of Appeals has explained that limiting the liability of utilities serves the public interest of low utility rates, and that "[a] limitation of liability is an essential and valid part of the rate[.]" *Computer Tool & Engineers v. Northern States Power*, 453 N.W.2d 569, 572 (Minn. App. 1990).

Finally, the filed-rate doctrine's prohibition on awards of damages not set forth in tariff is consistent with the discussion led by Commissioner Tuma at the April 22, 2021 Commission hearing on the CSG program. In short, the discussion contemplated that only if a tariff provides for some monetary consequences could

such a penalty or award be proper. But, under the filed-rate doctrine, the Commission cannot award monetary relief unless that is first set forth in the tariff. We attached as Attachment C to our June 23, 2021 Comments details from that discussion.

Therefore, because the Commission lacks express authority to award damages, and because the Company's tariffs do not include any provision for the compensation that SunShare requests, its claim for monetary relief should be denied.

c. Claims of status of being a Qualified Facility and claimed applicability of PURPA are incorrect; but, even if correct would mandate denial of the Petition.

The Petition, in par. 2, claims that the SunShare projects are Qualifying Facilities (QFs) and that the provisions of Minn. Stat. §216B.164 and Minn. R. 7835 apply. As explained in the attached Appendix A, the CSG program is not a QF program. But, even if the SunShare allegations were true, then under PURPA the highest rate that could be paid to QFs is our avoided cost rate, which is a rate far below the rates payable under the CSG program. Therefore, if this allegation of CSGs being QFs is true, the Commission would be required to dismiss the Petition because it is seeking an unlawful rate.

CONCLUSION

SunShare has not met the requirements for granting a variance under Minn. R. 7829.3200 and therefore we ask that the Commission dismiss the Petition.

Dated: March 10, 2022

Northern States Power Company

APPENDIX A

This Appendix provides more details on specific issues addressed in the body of the Answer to the Petition.

PURPA AND QF ISSUES

SunShare, in par. 2 of the Petition, claims that its projects are Qualifying Facilities, and cites to Minn. Stat. § 216B.164 and Minn. R. 7835. This allegation is without merit. The Commission should exclude from its consideration any references in the Amended Complaint to Minn. Stat. § 216B.164 and Minn. R. 7835. The purpose of this statute is to implement PURPA. (See, Minn. Stat. § 216B.164, Subd. 2.) Similarly, the applicability of Minn. R. 7835 is to implement PURPA and § 216B.164. (See, Minn. R. 7835.0200.) However, the Community Solar Gardens program is not a PURPA program, so this statute and the corresponding rule do not apply here.

a. Prior Determination that the CSG Program Is Not a PURPA Program

The Minnesota Court of Appeals has determined that the CSG program is not a PURPA program. In the Sunrise appeal challenging the Commission's Orders prohibiting co-located gardens above 1 MW (after a phase-in allowing co-located gardens up to 5 MW that had submitted applications by a certain date), the Commission noted in its Appellate Brief that the CSG Program is not a PURPA program. We have previously included as Attachment F to our Comments of June 23, 2021, excerpts from this Commission Brief, and provide immediately below some excerpts from this Commission filing.

> When the Minnesota Legislature passed the CSG statute it authorized a novel and distinct program separate from the traditional process that governs the purchase of renewable energy from small third-party developers. In 1978, the U.S. Congress passed the Public Utility Regulatory Policies Act ("PURPA") in an effort to encourage the development of small renewable energy facilities and to reduce the demand for fossil fuels. *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983). The renewable energy facilities are known in the industry as "qualifying facilities" ("QF's"). *Id.* Pursuant to PURPA, utilities must purchase all electricity generated by a QF at the utility's avoided cost. *Id.* at 406. "Avoided cost" is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." *Id.*
>
> PURPA's provisions were codified in Minn. Stat. § 216B.164 ("co-gen statute"), and Xcel's Section 10 tariff was created to implement Minnesota's co-gen statute. The

> CSG program and Section 10 tariff have a few notable differences. First, the CSG program's "applicable retail rate" is higher than the "avoided cost" rate in the Section 10 tariff. (RPA, 28). Second, a developer under the CSG program may not proceed with their project if it would require Xcel to make a "material upgrade." (RPA, 33). The Section 10 tariff does not impose any such limitation. Third, under the Section 10 tariff, a project can be approved up to 10 MW. Minn. Stat. § 216B.164, subd. 2a(h).
>
> ... The Minnesota Legislature enacted the CSG statute as an alternative program to the PURPA/Section 10 process. If Sunrise wishes to avail itself of the CSG program's premium rates, it must also comply with the qualifications and limitations the Commission finds necessary to ensure the program is consistent with the public interest. Alternatively, there is nothing to prevent Sunrise from pursuing its projects as a PURPA QF under Xcel's Section 10 tariff.

Based on this, the Commission has already made the determination that the CSG program is not part of a PURPA program and that the PURPA statute does not apply.

The Appellate Court agreed, and stated:

> The entirety of Sunrise's PURPA argument rests on the contention that PURPA controls and, therefore, prohibits Xcel from denying a project on the basis of interconnection costs. But the CSG is an alternative program to the section 10 tariff that governs larger utility-scale projects because Minn. Stat. § 216B.164 already offers developers a vehicle for solar development. *In the Matter of the Petition of Northern States Power Company, d/b/a Xcel Energy, for Approval of Its Proposed Community Solar Garden Program*, Minn. Ct. of Appeals A15-1831, May 31, 2016, p. 19.

It is important to note that the CSG program (set forth at our tariff sheets 9-64 through 9-99), the topic of the CSG Docket (Docket No. E002/M-13-867), and the topic of this Appellate Court opinion all involve the same CSG program that pertains to the current Petition.

In its Reply Comments in the Sunrise 20-892 Complaint docket, counsel for Sunrise (who is also counsel for SunShare here) cited to Minn. Stat. §480A.08, Subd 3, (b), to argue that this Appellate Court Order is not binding. This statute states in part as follows:

> The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.

We do not see how this statute is applicable here because the appellate order included a written opinion, and this statutory language only applies if there is no written opinion.

b. The Value of Solar Is Not a QF PURPA Avoided Cost Rate

During Oral Argument on the Sunrise 20-892 Complaint, Counsel for Sunrise (also counsel for SunShare) tried to distinguish the Appellate Court opinion by noting that the "Applicable Retail Rate" applied to CSG applications that was in place in the earlier stage of the CSG program while the current applications under the CSG program receive the Value of Solar (VOS) rate. Counsel argued that the VOS rate is the same rate applied to net metered PURPA applications, citing Minn. Stat. 216B.164, Subdivision 10, while the Applicable Retail Rate was not an avoided cost rate. This misconstrues the law and facts.

Under Subdivision 10, the VOS rate is only applied to net metered applications when the utility first asks for Commission approval to have the VOS apply and the Commission then approves this. Xcel Energy has not applied to use the VOS rate for net metered applications, and no VOS rate applies to net metered applications. Even when the VOS rate for projects would be so approved, its application would replace the rates applicable under Minn. Stat. § 216B.164, Subdivisions 3 and 3a, meaning net metered projects greater than 40 kW and less than 1,000 kW. This corresponds to our net metering rate codes A51 through A56 found at tariff sheet 9-1 and sheets 9-3 through 9-4.3. These net metering rates provide payment based on our current avoided costs of about $0.02 per kWh. This compares to the recent updates in the CSG Docket to the levelized 2021 VOS rate of about $0.1104 per kWh, and the 2021 Applicable Retail Rate applicable to older CSG applications that varies by subscriber class in the range of $0.13770 to $0.16860 per kWh. As a result, the VOS rate is about 5 times larger than the avoided costs applicable to net metered PURPA facilities.

Further, even if somehow the VOS rate would apply to net metered facilities under our A51 through A56 rate codes, the gardens would still not be eligible for these rate codes. All of these rate codes are subject to the "Individual System Capacity Limits" which consistent with Minn. Stat. § 216B.164, Subd. 4c, applies the 120% rule for solar systems as shown on tariff sheet 9-1. The 120% rule limits total generation system annual production kilowatt hours to 120% of the customer's on-site annual electric energy consumption. A CSG only has minimal load compared to its production, and therefor would not qualify for these net metering rate codes.

We also note that the VOS rate is not an avoided cost rate. FERC Order 872 is clear that an avoided cost rate applicable to PURPA or QF projects does not include compensation for environmental benefits. The VOS includes compensation for environmental benefits. This FERC Order states:

> 123. Finally, although we are sympathetic to the claims of certain QFs that they provide non-energy benefits (such as environmental benefits, waste reduction benefits, and economic development benefits) that are not reflected in avoided cost rates, PURPA section 210(b) prohibits the Commission from requiring QF rates to be set above full avoided costs. Because the Commission already requires states to set QF rates at full avoided costs, it is barred from requiring QF rates set higher than that based on the non-energy benefits that QFs may also provide. However, nothing in PURPA, the PURPA Regulations as they currently exist, or this final rule would prevent states from rewarding QFs for such non-energy benefits so long as that is done outside of PURPA, such as is now done for renewable energy credits (RECs) to compensate QFs for providing unique environmental or other non-PURPA benefits. We address in the sections below each type of competitive price that could be used as an acceptable energy avoided cost.
>
> *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Order No. 872, 85 FR 54638 (Sep. 2, 2020), 172 FERC ¶ 61,041 (2020).

The FERC has determined that PURPA QFs need to receive an avoided cost rate, and that a rate that includes compensation for non-energy benefits is outside of PURPA. The VOS rate that is currently applicable to the applications in the CSG program, such as the current SunShare CleodSun application, is a rate that includes non-energy benefits. This provides further support for the reality that the CSG program is not a PURPA program.

c. SunShare Has Entered into a Settlement Agreeing that Minn. R. 7835 Does Not Apply

While SunShare argues here that the PURPA statute (Minn. Stat. §216B.164) and implementing Minn. R. 7835 apply to the Community Solar Garden program, SunShare has previously rejected this argument as part of a settlement agreement filed in *In the Matter of the Appeal of an Independent Engineer Review Pertaining to the SunShare Linden Project (Community Solar Gardens Program)* Docket No. E002/M-19-29. There, the Independent Engineer issued a report that included the IE ruling that "... the

burden of proof is on the utility pursuant to Minnesota Administrative Rule 7835.4500." On January 23, 2019, Xcel Energy filed an appeal to the Commission contesting all findings and rulings of the IE report. This appeal included our argument at pages 31-32:

> The IE made a determination on burden of proof, although this issue was not raised by SunShare. The IE did not, however, employ the burden of proof standard to decide any issues. We briefly discuss burden of proof to make clear our understanding that the IE was incorrect on this issue, and do so to help set expectations going forward on other interconnection disputes arising under the Solar*Rewards Community program. The IE Report (at page 2) cites to Minn. R. 7835.4500, which provides that in disputes between a utility and a qualifying facility the burden of proof is on the utility. This rule does not apply here. The purpose of the rules in Minn. R. Chapter 7835 is to implement PURPA and Minn. Stat. § 216B.164. (see, Minn. R. 7835.0200). However, the Minnesota Court of Appeals has already ruled that the Solar*Rewards Community program is not a PURPA program and that Minn. Stat. § 216B.164 does not apply to the Solar*Rewards Community program.18 Accordingly, the burden of proof standard cited by the IE does not apply to the Solar*Rewards Community program.

On April 29, 2018, Xcel Energy and SunShare (on behalf of itself and its subsidiaries) entered into a settlement filed in that docket, which included the following provision:

> 11. The Parties agree that the Independent Engineer Report that was at issue in the Linden Docket is rejected in whole and is of no effect.

Consistent with this, SunShare should not be allowed to make arguments that it has affirmatively rejected in a settlement agreement. Otherwise, it would be unilaterally reopening that prior settlement agreement which it is not authorized to do.

d. The SunShare CleodSun Project Cannot Be Both in the CSG Program and Have QF PURPA Status

SunShare has a choice – have these projects QFs at avoided cost for purchases; or, have these projects be in the CSG program at the VOS rate and not be a PURPA QF. It cannot have PURPA QF status and also be part of the CSG program that provides compensation above avoided cost at the VOS rate. It has already submitted an application to be part of the CSG program. It would need to withdraw that CSG

application for the CleodSun project and forever reject the ability for this project to be part of the CSG program for this project to properly obtain PURPA QF status.

The excerpt above from FERC Order No. 872 is clear that QF PURPA rates need to be set at avoided cost and that the VOS rates are above avoided costs. A state commission can set rates above avoided costs, but this needs to be done outside of PURPA.

CERTIFICATE OF SERVICE

I, Lynnette Sweet, hereby certify that I have this day served copies of the foregoing document on the attached list of persons.

xx by depositing a true and correct copy thereof, properly enveloped with postage paid in the United States mail at Minneapolis, Minnesota; or

xx by electronic filing.

Docket No.: E002/C-21-125

Dated this 10th day of March 2022.

/s/

Lynnette Sweet
Regulatory Administrator

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Jacob	Bobrow	jbobrow@mysunshare.com	SunShare	1724 Gilpin St Denver, CO 80218	Electronic Service	No	OFF_SL_21-125_Official Service List 21-125
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-125_Official Service List 21-125
James	Denniston	james.r.denniston@xcelenergy.com	Xcel Energy Services, Inc.	414 Nicollet Mall, 401-8 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_21-125_Official Service List 21-125
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_21-125_Official Service List 21-125
Elizabeth	Reddington	lreddington@pivotenergy.net	Pivot Energy	1750 15th St Ste 400 Denver, CO 80202	Electronic Service	No	OFF_SL_21-125_Official Service List 21-125
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_21-125_Official Service List 21-125
Will	Seuffert	Will.Seuffert@state.mn.us	Public Utilities Commission	121 7th Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-125_Official Service List 21-125
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_21-125_Official Service List 21-125
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