

## Staff Briefing Papers

Meeting Date July 14, 2022 Agenda Item \*\*4

Company Northern States Power d/b/a Xcel Energy

Docket No. **E002/C-21-125**

**In the Matter of the Formal Complaint and Request for Expedited Relief by SunShare, LLC Against Northern States Power Company d/b/a Xcel Energy regarding OsterSun Project**

Issues 1. What action should the Commission take regarding SunShare's request for a variance from Xcel Tariff Sheet 9-64.1a regarding the applicable VOS (Value of Solar) rate for all five of the SunShare Projects?<sup>1</sup>

Staff Derek Duran Derek.Duran@state.mn.us 651-201-2206

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### Relevant Documents

### Date

Xcel Energy - Partial Settlement Agreement	December 21, 2021
SunShare - Petition for Variance from Xcel Tariff	January 31, 2022
PUC - Notice of Answer and Comment Period	February 18, 2022
Xcel Energy - Answer to Formal Complaint	March 10, 2022
SunShare - Initial Comments	March 21, 2022
Xcel Energy - Initial Comments	March 21, 2022

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<sup>1</sup> SunShare Projects include: OsterSun, CleodSun, GraniteSun, QuarrySun, and SinclairSun

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.



**Relevant Documents**

**Date**

Department of Commerce - Initial Comments

March 21, 2022

SunShare - Reply Comments (and Exhibit A)

March 31, 2022

Xcel Energy - Reply Comments

March 31, 2022

## **I. Statement of the Issues**

Should the Commission grant SunShare's petition for expedited relief by approving a 2020 Value of Solar (VOS) year for the SunShare Projects?

## **II. Background**

On December 21st, 2021 Xcel filed a partial settlement agreement that resolved several of the issues between the Company and SunShare. It also allowed for SunShare to petition for 2020 VOS rates for their projects instead of the 2019 VOS rates they were granted.

On January 31st, 2022 SunShare filed a petition for a variance to the Xcel tariff so that SunShare may receive 2020 VOS rates for their CSG projects as recompense for alleged excessive delays from Xcel.

On February 18th, 2022 the PUC filed a Notice of Answer and Comment Period.

On March 10th, 2022 Xcel filed an Answer to the Formal Complaint and Request for Immediate Relief.

On March 21st, 2022, Xcel, SunShare, and the Department all filed initial comments.

On March 31st, 2022, Xcel and SunShare filed Reply Comments.

## **III. Parties' Comments**

### **Petition**

In 2019, SunShare proceeded through the interconnection process for five different Community Solar Garden (CSG) projects: OsterSun, CleodSun, GraniteSun, QuarrySun, and SinclairSun (collectively, "SunShare Projects").<sup>2</sup> Each of the five projects were "Deemed Complete" in 2019.

An application is Deemed Complete upon the successful completion of the requirements in Xcel Tariff Sheet 9-67 step (i) which includes:

- (i) Applications are considered submitted (and will advance to engineering review) once the applicant furnishes all requested documents and information in the Solar\*Rewards Community online application system, including:
  - a. the applicant's contact information,
  - b. garden information including system location and specifications,
  - c. application fee and deposit,
  - d. engineering documents, including one-line diagrams, site plan, and interconnection Application

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<sup>2</sup> P. 1, SunShare Petition, 1/31/22

When an application is “Deemed Complete” is important as according to Xcel Tariff Sheet 9-64.1 “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”).<sup>3</sup> This means an application deemed complete in 2019 will be given a 2019 VOS rate, likewise, an application deemed complete in 2020 will receive a 2020 VOS rate. Since all of the SunShare Projects were deemed complete in the 2019 calendar year, each of the projects were given a VOS Vintage Year of 2019. The typical CSG interconnection application steps proceed in this order:

- Initial Application Fee and Submitted Application
- General Interconnection Application
- Initial Review and Provision of Statement of Work for the Engineering Study done by Xcel
- Submission of a Statement of Work to Xcel by the developer
- Application deemed “Expedited Ready”
- Engineering Study and Interconnection Agreement (IA)
- Signed Interconnection Agreement.

Four out of the five SunShare applications in question had quite similar paths and similar complaints. Listed below, are the four relevant timelines for the projects in the interconnection process. Importantly, according to the interconnection tariff, once Xcel deems a project “Expedited Ready”, the Company has 50 business days to complete the Engineering Study and provide the resulting Interconnection Agreement to the developer.

Project Name	Execution and Submission of the SOW	Deemed “Expedited Ready”	IA due date	Date IA sent	Days Late
CleodSun	9/30/2019	10/2/2019	12/16/2019	2/4/2020	50
GraniteSun	6/18/2019	6/19/2019	8/29/2019	12/16/2019	109
QuarrySun	6/18/2019	6/19/2019	8/29/2019	10/11/2019	43
SinclairSun	6/18/2019	6/19/2019	8/29/2019	10/7/2019	39

In each of the projects, including OsterSun, Xcel sent the Interconnection Agreements several weeks late. OsterSun was unique from the rest in that SunShare identified a material error and “significantly lower cost alternative” for the necessary upgrades.<sup>4</sup> Xcel required SunShare to fund the full cost estimate (\$1,089,265) before it would review the lower cost alternative which SunShare states would make the project unfinanceable. SunShare states that it was not until they filed a complaint that Xcel agreed to issue a revised IA on February 3, 2022. This revised IA came out to be \$428,693 over \$500,000 less than the previous cost estimate.<sup>5</sup> SunShare had originally submitted the Interconnection Application to Xcel on March 27, 2019.

<sup>3</sup> Xcel Tariff Sheet 9-64.1

<sup>4</sup> P. 4, SunShare Petition, 1/31/22

<sup>5</sup> P. 3, SunShare, Reply, 3/31/22

SunShare points out that “while the facts regarding the delays have slight differences with regard to each of the projects, all of them were clear violations of Xcel’s Tariff, directly caused increases to the cost of developing the projects, and will subject them to unfair competition with other projects that will be receiving a later-year higher VOS rate.”<sup>6</sup> In addition to those harms, SunShare says that the delays “caused projects not only to miss the 2019 construction year, but also to miss the opportunity to even start construction in 2019, thus losing the opportunity to secure a 30% investment tax credit, which stepped down to 26% on January 1, 2020 for projects started after that date, and has since remained at that lower level”.<sup>7</sup>

The investment tax credit referred to by SunShare is the federal investment tax credit (ITC) available to be used for privately owned solar photovoltaic (PV) projects. The value of the ITC in 2019 was 30% of the qualifying upfront capital costs of a project and “set to decline from a 30% value to 26% by 2020, 22% by 2021, and 10% thereafter” as shown in the chart below.<sup>8</sup>

Year of Commence Construction	Deadline for Placement in Service	ITC Amount
2019	End of 2023 <sup>a</sup>	30%
2020		26%
2021		22%
2022 onward	2022 onward	10%

In order to qualify for a rate in a specific year, the project must “commence construction” in that year. A project must meet one of two different requirements in order to meet the “commence construction” threshold – safe harbor or physical work.

**Safe harbor**—Ensure that at least 5.0% of final qualifying project costs are incurred in that year. For example, if the taxable entity paid or incurred at least \$50,000 of eligible costs toward the project in 2019 and ultimately completes the project in 2023 with final qualifying project costs of \$1 million, then that taxable entity would be able to claim the full 30% tax credit for qualifying costs (or \$300,000 in this simplified case).

**Physical work**—Ensure that “physical work of a significant nature” commences in that year. According to the IRS notice, if the taxable entity installed PV racking, for example, before the end of 2021 and makes continuous efforts to ultimately complete the project in 2023, then that taxable entity would be able to claim a 22% tax credit. The private owner must document continuous efforts to meet the physical work requirement.

SunShare claims that if Xcel had sent the respective Interconnection Agreements on time and according to the tariff, they would have been able to begin construction in 2019 and thus be eligible for the 2019 ITC amount of 30% but because they received the IAs so late in the year fall

<sup>6</sup> P. 2, SunShare Petition, 1/31/22

<sup>7</sup> P. 2, SunShare Petition, 1/31/22

<sup>8</sup> US Department of Energy, Office of Energy Efficiency And Renewable Energy [Fact Sheet](#)

and winter weather prevented construction from occurring.<sup>9</sup> This resulted in SunShare only being eligible for the 26% amount rather than the 30% they could have potentially received.

SunShare claims that they made repeated requests to Xcel to enter a mediation process between November 2019 and February 2020. SunShare requested that the parties enter a formal mediation on February 6, 2020 as these projects were pre-MN DIP and there was no other recourse for resolving the issue. Formal mediation was held between the two parties between August 2020 and March 2021 which led to a Partial Settlement in December 20, 2021.

Out of that Partial Settlement, SunShare was free to petition to request a variance to the VOS year for their projects. That is what SunShare proposes to do in this petition. SunShare requests a variance to apply the 2020 VOS to the SunShare Projects due to the unique circumstances of this case.”<sup>10</sup> (Decision Option 1)

SunShare states that the Commission is able to alter rates and cites Minn. Stat. § 216B.25 which reads:

“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 ... and may reopen any case following the issuance of an order therein, for the taking of further evidence or for any other reason.”

SunShare cites Minn. R. 7829.3200 claiming it meets the three conditions that are needed in order for the Commission to be able to grant a variance. The rule and its three conditions read:

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.

### **Variance Rule Not Appropriate**

Xcel argues that VOS rate is in their tariff and 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.<sup>11</sup> Xcel states that if the Commission does find that the Rule does apply, SunShare has not met the three requirements for a variance.<sup>12</sup>

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<sup>9</sup> P. 14, SunShare Petition, 1/31/22

<sup>10</sup> P. 13, SunShare Petition, 1/31/22

<sup>11</sup> P. 6, Xcel Energy, Answer, 3/10/22

<sup>12</sup> P. 2, Xcel Energy, Reply, 3/31/22

## Variance Conditions

*Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule*

SunShare claims that they meet the first condition of the Minn. R. 7829.3200. SunShare says that 100% of their projects were delayed for months due to Xcel's delays and violations of their own tariff.<sup>13</sup> SunShare stresses that it is not only the length of the delay that has been damaging, but the timing of "the delays has also placed an excessive burden on SunShare's ability to construct the projects in a timely manner".<sup>14</sup> Adding to that sentiment, SunShare emphasizes that the delays were "not the types of run-of-the-mill delays stemming from procurement problems or issues establishing site control" and that "to the contrary, Xcel unreasonably failed to provide IAs for all of the SunShare Projects."<sup>15</sup> SunShare argues that for all intents and purposes, the "deemed complete" date for the projects should have been 2020, not 2019.

The Interconnection Agreements for three of the projects QuarrySun, GraniteSun, and SinclairSun were due in August which "would have at least been feasible to move forward with construction in 2019." However, because they were delivered so late in the year, the construction for the projects were "hampered by practical considerations, namely, fall and winter weather."<sup>16</sup> This timing was crucial in order to take advantage of the 2019 Investment Tax Credit.

Additionally, SunShare claims the amount of time SunShare had to spend resolving all of these issues caused by Xcel's tariff violations via formal mediation and then formal complaints also caused construction to be significantly delayed.<sup>17</sup> Resolution to these issues was only recently partially resolved in December 2021, meaning that "SunShare's Projects will now be forced into construction in 2022 and 2023". SunShare states that they now bear "the full burden of Xcel's delays in the form of the loss of the benefit of the higher 2019 Investment Tax Credit, the costs of capital and inflation incurred for each project while working to resolve Xcel's delays, and being forced into unfair competition with other projects that are not subject to these unique circumstances"<sup>18</sup> SunShare also points to a decision made by the Colorado PUC that awarded SunShare an adder to compensate it for a delay in interconnecting CSG projects in Colorado caused by Xcel.<sup>19</sup>

For these reasons, SunShare believes that a 2020 VOS rate, while not a full compensation, would help mitigate the financial loss and "restore fair competition between SunShare's Projects and other developer's projects."<sup>20</sup>

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<sup>13</sup> P. 13, SunShare Petition, 1/31/22

<sup>14</sup> P. 13, SunShare Petition, 1/31/22

<sup>15</sup> P. 4-5, SunShare, Initial, 3/21/22

<sup>16</sup> P. 14, SunShare Petition, 1/31/22

<sup>17</sup> P. 14, SunShare Petition, 1/31/22

<sup>18</sup> P. 14, SunShare Petition, 1/31/22

<sup>19</sup> P. 15, SunShare Petition, 1/31/22

<sup>20</sup> P. 14, SunShare Petition, 1/31/22

In response, Xcel believes that SunShare still has not proven this condition - that they have not experienced an excessive burden. Xcel admits that there have been some delays on their part but “many other DER and CSG projects have been delayed in receiving their IAs, and there is no unique burden on SunShare.”<sup>21</sup> Additionally, the Company does “not believe this delay is a cause in fact of any injury to SunShare ... because SunShare has not been ready, willing and able to sign and fund the IAs timely.”<sup>22</sup> The Company states that the Commission has used the “ready, willing and able” standard before to determine if a “legally enforceable obligation (LEO) has been created in the interconnection context, citing a 2013 Order: *Petition by Highwater Wind LLC and Gadwall Wind*. Xcel uses this standard to highlight how long it took SunShare to sign the respective IAs once they received them and therefore the harm related to “missing the 2019 ITC appear to be exaggerated.”<sup>23</sup> Xcel provides the following table outlining SunShare’s response times:

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

Xcel points out that to their 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” and that all that was needed was for SunShare to spend 5% worth of solar panels (solar panels Xcel believes could be shared across several projects) for their projects in 2019 in order to be eligible for the 2019 ITC but did not do so and was perhaps not taking prudent measures to mitigate or eliminate its alleged losses.<sup>24</sup>

Additionally, Xcel posits that 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.”<sup>25</sup>

Xcel also states that the Colorado case between Xcel and SunShare is not applicable to this current situation and that SunShare is misconstruing what happened and that it was more

<sup>21</sup> P. 7, Xcel Energy, Answer, 3/10/22

<sup>22</sup> P. 7, Xcel Energy, Answer, 3/10/22

<sup>23</sup> P. 7, Xcel Energy, Answer, 3/10/22

<sup>24</sup> P. 8, Xcel Energy, Answer, 3/10/22

<sup>25</sup> P. 8, Xcel Energy, Answer, 3/10/22



related to Colorado's specific laws and CSG program.<sup>26</sup> Additionally, Xcel states that decisions in Colorado do not create precedence in Minnesota.

In response to these claims, SunShare argues Xcel is just trying to minimize the "resulting excessive burden on SunShare fail[ing] to recognize the practical result of these delays" and that Xcel's "pontifications about SunShare's ability to purchase equipment at great expense so as to qualify for the 2019 ITC, in addition to being speculation, is also unavailing."<sup>27</sup> SunShare states Xcel is essentially saying they could have remedied the Xcel tariff violations by paying out of pocket for equipment – instead, "Xcel could have simply not violated its tariff." Additionally, OsterSun in particular received three different IAs due to being both untimely and erroneous, resulting in the indicative cost estimate being reduced from \$1,189,374 to \$428,603.<sup>28</sup>

Lastly, SunShare claims that Xcel's delays have been fatal to its CleodSun project as it has now "become impossible to obtain a permit to construct the project at all from McLeod County."<sup>29</sup>

*Granting the variance would not adversely affect the public interest*

SunShare proffers that granting relief is in the public interest because it will "promote the development of distributed generation consistent with Minnesota law and policy, which reduces pollutant emissions, provides access to clean energy resources for Minnesotans and creates jobs, including good paying union jobs, to assist in Minnesota's economic recovery."<sup>30</sup>

Xcel responds by claiming 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" and that "Minnesota customers bear the cost of the program in that all Bill Credit costs above MISO's LMP market are recovered from Minnesota customers."<sup>31</sup> Additionally, the Company cites Minn. Stat. §216B.03, "any doubt as to reasonableness should be resolved in favor of the consumer" and that the consumer in this case are Xcel's retail customers.

In response, SunShare stresses that the CSG program is not subsidized and shares language from the Department of Commerce's 2014 VOS Report:<sup>32</sup>

While NEM [net energy metering] effectively values PV-generated at the customer retail rate, a VOS tariff seeks to quantify the value of distributed PV electricity. If the VOS is set correctly, it will account for the real value of the PV-generated electricity, and the utility and its ratepayers would be indifferent to whether the electricity is supplied from customer-owned PV or from comparable conventional means. Thus, a VOS tariff eliminates the NEM cross-subsidization concerns.

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<sup>26</sup> P. 10, Xcel Energy, Answer, 3/10/22

<sup>27</sup> P. 5, SunShare, Initial, 3/21/22

<sup>28</sup> P. 3, SunShare, Reply, 3/31/22

<sup>29</sup> P. 4, SunShare, Reply, 3/31/22. Staff Note: CleodSun was the focus of SunShare's formal complaint in Docket No. E002/C-21-126. SunShare has withdrawn that Complaint.

<sup>30</sup> P. 15, SunShare Petition, 1/31/22

<sup>31</sup> P. 9, Xcel Energy, Answer, 3/10/22

<sup>32</sup> P. 5, SunShare, Initial, 3/21/22

SunShare says that to claim that granting their request is a subsidy “is to say that the VOS tariff was not set properly by the Commission to account for the real value of the PV-generated electricity.” SunShare reiterates that they are not requesting an adder but to simply be granted a VOS rate that more accurately reflects the time period that electricity is being generated.

Xcel continues, saying that by granting the relief to SunShare it would give them “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.”<sup>33</sup>

Additionally, Xcel says that the Company 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 therefore should not grant SunShare relief “due to the imposition of this QSP underperformance payment.”<sup>34</sup> The Company notes that MnSEIA had previously requested to change the VOS rate for projects delayed due to the aforementioned QSP underperformance but later accepted the \$1 million payment the Commission ordered instead.<sup>35</sup> Xcel claims that because of that, “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.”<sup>36</sup>

Lastly, Xcel maintains that the Commission does not have the power to grant equitable relief in this case. The Company cites several court cases claiming that they highlight that the Commission does not possess this power, including a quote from *In re Qwest's Wholesale Service Quality*, “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.”<sup>37</sup>

*Granting the variance would not conflict with standards imposed by law*

SunShare believes that the Commission has the authority to “waive an applicable tariff provision it previously approved for good cause shown” and “retains the authority to grant equitable relief” citing Minn. Stat. § 216B.25 and a 2020 Commission Order which SunShare states “grant[ed] a partial waiver of late fees on equitable grounds.”<sup>38,39</sup>

Xcel stresses that what SunShare is asking for is compensatory damages which the Company states the Commission does not have the authority to do. Xcel states that this has been made clear through Minnesota Supreme Court decision like *Siewert v. N. States Power Co* (2011)

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<sup>33</sup> P. 9, Xcel Energy, Answer, 3/10/22

<sup>34</sup> P. 10, Xcel Energy, Answer, 3/10/22

<sup>35</sup> Staff Note: Xcel cites MnSEIA’s November 18, 2020 comments in Docket 13-867 where they made the VOS rate change request and juxtaposes it with the January 28, 2021 Agenda Meeting where MnSEIA rescinded that request and accepted the \$1 million underperformance payment Commission ruling.

<sup>36</sup> P. 11, Xcel Energy, Answer, 3/10/22

<sup>37</sup> P. 12, Xcel Energy, Answer, 3/10/22

<sup>38</sup> P. 15, SunShare Petition, 1/31/22

<sup>39</sup> In the Matter of the Petition of N. States Power Co., d/b/a Xcel Energy, for Approval of Its Proposed Cmty. Solar Garden Program, No. E-002/M-13-867, 2020 WL 605932 (Feb. 4, 2020)

which says while the “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.”<sup>40</sup>

Additionally, Xcel says that granting a new VOS rate would violate the filed-rate doctrine “which precludes a litigated claim for monetary damages for violation of a tariff such as alleged here.” The Company goes on saying the filed rate doctrine “prevents courts from adjudicating private claims that would effectively vary or enlarge rates changed under a published tariff.”

Xcel claims that the Siewert case is consistent with state statute, citing Minn. Stat. §216B.06:

**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.

**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.

Xcel adds that if there were monetary consequences for tariff violations the tariff would need to be modified and even then, it would not be applicable to this case because tariff language modifications can only be prospective, not retroactive.<sup>41</sup>

In response, SunShare says that Xcel “[built] an elaborate strawman” by saying that SunShare is asking the Commission for compensatory damages.”<sup>42</sup> SunShare again quotes Minn. Stat. § 216B.25 claiming this gives the ability to the Commission to grant a waiver of any provision of Xcel’s tariff previously approved by order of the Commission:

... 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.

<sup>40</sup> P. 13, Xcel Energy, Answer, 3/10/22

<sup>41</sup> P. 15, Xcel Energy, Answer, 3/10/22

<sup>42</sup> P. 6, SunShare Initial, 3/21/22

Xcel states that the petition is clear in that “SunShare is requesting an increased VOS rate because of the alleged harm that they have suffered, and that falls squarely within the concept of compensatory damages which the Commission cannot award here.”<sup>43</sup> Xcel continues saying that granting this relief would entail the Commission applying rates retroactively which the Commission does not have the ability to do. Additionally, Xcel warns that this would provide “an unlawful rate preference, and create potential precedence for projects that are delayed for a large number of reasons to request a new VOS bill credit rate if subsequent bill credits rates are higher than the rate for which the CSG, by tariff, qualifies.”

### *The Department*

The Department recommends that the Commission deny SunShare’s request for a variance to its Value of Solar rate. The Department says that rates are determined when an application is deemed complete and that “just as a homeowner refinancing a mortgage has to lock in a mortgage rate prior to closing only to have interest rates fall further after being locked in, the solar developer shoulders some risk in filing a CSG application that future rates may be higher.”<sup>44</sup>

### **Miscellaneous**

#### *Petition should have been filed in Docket No. 13-867*

Xcel claims that the applicable tariffs SunShare references in its petition, tariff sheet 9-64.1a and 9-64.102 were authorized by the Commission in the CSG docket, Docket 13-867. Additionally, the statute and rule SunShare is using to justify the variance (Minn. Stat. §216B.25 and Minn. R. 7829.3200) refer to amending or reopening cases or orders that have been filed in Docket 13-867.<sup>45</sup> Xcel adds that Docket 13-867 includes more parties that may be interested in the case.

SunShare responds by saying that Docket 21-125 is appropriate since that is where the partial settlement was filed and represents unique circumstances to SunShare. However, SunShare says that they are open to filing in the CSG docket so that the CSG community could be more informed about the issue and that perhaps this should be moved to the CSG docket if Xcel is correct in that “in fact it treats all CSG developers in a similar manner, delaying their projects and increasing their costs.”<sup>46</sup>

### *Qualifying Facility*

In their petition, SunShare states that the SunShare Projects are qualifying facilities (QF) under Minn. Stat. § 216B.164 and Minn. R. 7835.0100, subp. 19.<sup>47</sup> Xcel says that CSGs are not

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<sup>43</sup> P. 3, Xcel Energy, Reply, 3/31/22

<sup>44</sup> P. 2, Department of Commerce, Initial, 3/21/22

<sup>45</sup> P. 5, Xcel Energy, Answer, 3/10/22

<sup>46</sup> P. 3, SunShare, Initial, 3/21/22

<sup>47</sup> P. 3, SunShare Petition, 1/31/22. Staff Note: “Qualifying Facilities (QF)” is a term established in the federal Public Utilities Regulatory Policy Act (PURPA) of which Minn. Stat. 216B.164 is the state statute implementing PURPA.

Qualifying Facilities but even if they were, then the highest rate that could be paid would be the avoided cost rate under PURPA.<sup>48</sup>

SunShare responds saying that none of its projects are PURPA avoided cost rate projects because they do not need to be in order to be qualifying facilities under Minnesota law, citing Minn. R. 7835.0100 subp. 19 which defines a QF as a small power production facility that satisfies the conditions of title 18, part 292 of the Code of Federal Regulations. 18 C.F.R. § 292.203 in turn defines a qualifying facility that is exempt from filing requirements of the rule as a facility that has capacity of 1 MW or less whose primary fuel source is, among other things, renewable resources.”<sup>49</sup> SunShare states that Minnesota rules recognize that QFs receive numerous different rates, including the VOS rate, and do not need to use the avoided cost rate as Xcel claims.

Xcel states that “the Minnesota Court of Appeals has already determined that the Community Solar Garden program is not a PURPA program. Based on this, SunShare has no QF standing. SunShare argues that Minnesota law has a different standard for being a QF, but this is not correct. Minn. Stat. §216B.164 and Minn. R. Ch. 7835, upon which SunShare relies, implement PURPA and related federal regulations” citing the April 1, 2014 order, page 1 footnote 1, in Docket No. E999//M-14-65, In the Matter of Establishing a Distributed Solar Value Methodology, and Minn. Stat. §216B.164, Subd. 2.<sup>50</sup>

#### IV. Staff Analysis

Staff notes that the legal arguments listed in this briefing paper such as the *Siewert v. N. States Power Co*, *Peoples Natural Gas Co. v. Minn. Pub. Utils Comm’n*, and discussions about PURPA and Qualified Facility status are not novel and there will not be legal analysis conducted in this briefing paper.

Staff also notes that this docket originally asked relief due to a technical dispute for solely the OsterSun project. It has since evolved into SunShare requesting relief through changing the VOS rate for five CSG Projects due to Xcel allegedly violating their tariff. Xcel does not appear to object to this change in scope.

The question before the Commission is not whether Xcel allegedly sent SunShare Interconnection Agreements later than their tariff allows for or not. Xcel does not dispute this. The question is whether or not SunShare’s situation is unique and warrants the requested relief. SunShare claims that due to the number of projects that were hindered by the Interconnection Agreements being sent late, the timing of the lateness and its relation to the 2019 vs 2020 ITC federal credit (a drop from 30% to 26% of costs covered), and the fact that that these projects pre-date the MN DIP and did not have access to an Independent Engineer leaving, SunShare with no formal way to resolve the issue outside of a formal complaint. Due to

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<sup>48</sup> P. 16, Xcel Energy, Answer, 3/10/22

<sup>49</sup> P. 6-7, SunShare, Initial, 3/21/22

<sup>50</sup> P. 3, Xcel Energy, Reply, 3/31/22

all of these circumstances, SunShare believes that they have been uniquely harmed and therefore request a tariff variance to help compensate for the harm done.

Staff does believe that SunShare has been impacted but questions whether this requires movement toward compensation. The tariff language did not and does not include language that speaks on punitive or compensatory actions for situations like these. The tariff was not unclear at the time these CSG Projects were being initiated. The Department makes a great point about risk. CSGs are businesses, and oftentimes, in order to be profitable, businesses must be willing to accept risk. The Department argues that in the developers' case risk can manifest in the form of delays. "Delays can be the result of any number of factors including delays in procuring needed equipment, engineering concerns, and site control issues" and may have resulted from Xcel, the developer, or third party.<sup>51</sup> SunShare responds to this by claiming that changing to a 2020 VOS rate would simply be a more accurate and representative rate due to the delays they experienced. Staff wonders whether this need for accuracy would be apparent if the 2020 VOS rate was set lower than the 2019 VOS rate.

Staff warns that if the Commission does rule that the situation SunShare describes is unique and applies relief requested without a tariff modification it may lead to other developers claiming similar impact from interconnection delays and requesting similar treatment. If that is the case, the Commission may want to consider tariff revisions to account for this scenario if needed.

However, while risk is a part of the equation for private businesses profitability, Xcel Energy is not a fully private business and is regulated by the Commission. SunShare and other developers may like to see Xcel be held accountable even if they do not receive any direct relief. Xcel does not deny that the claims that they were late in sending the Interconnection Agreements to SunShare and instead relays that SunShare was not "ready, willing and able" to begin construction on their projects, pointing to the long gaps between receiving the IAs and signing the IAs. However, there was no deadline to sign an IA pre-MN DIP and when to sign the IAs was solely up to SunShare's discretion.

The Commission may think that some accountability measures may be appropriate. Staff does point out Xcel was given a \$1 million QSP underperformance payment for complaints that included missing tariff-defined deadlines in the interconnection process related primarily to residential solar projects. Additionally, since this time Xcel has taken measures to address these issues by hiring more staff among other things which has reduced their deadline violations. Further, the Commission Order on March 31<sup>st</sup>, 2022 in Docket No. E999/CI-16-521 has provisions that should both streamline and quicken the interconnection process, including for CSG projects. However, these changes do not directly address the projects SunShare has identified in this dispute.

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<sup>51</sup> P. 2, Department of Commerce, Initial, 3/21/22

## V. Decision Options

**Should the Commission grant SunShare's petition for expedited relief by approving a 2020 VOS year for the SunShare Projects?**

1. Grant a variance for the following SunShare Projects to allow them to receive the 2020 VOS rate instead of the 2019 VOS rate: (*SunShare*)
  - a) OsterSun
  - b) CleodSun
  - c) QuarrySun
  - d) GraniteSun
  - e) SinclairSun
2. Deny SunShare's request for expedited relief. (*Xcel, the Department*)