STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Katie Sieben	Chair
Valerie Means	Commissioner
Matt Schuerger	Commissioner
Joseph K. Sullivan	Commissioner
John Tuma	Commissioner

In the Matter of Petition by CenterPoint Energy and the City of Minneapolis to Introduce a Tariffed On Bill Pilot Program	PUC Docket No. G-008/M-21-377

COMMENTS OF LEGAL SERVICES ADVOCACY PROJECT

On September 1, 2021, CenterPoint Energy ("CenterPoint") and the City of Minneapolis ("the City") (collectively, "the Proponents") filed a petition ("Petition") asking the Minnesota Public Utilities Commission ("the Commission") to approve a Tariffed On Bill pilot program ("TOB").[1] On September 17, 2021, the Commission issued a *NOTICE OF COMMENT PERIOD*, seeking public comment on the TOB proposal.[2] The Legal Services Advocacy Project ("LSAP") respectfully submits these comments adamantly opposing the Petition. Based on the fatal legal defects and substantial programmatic flaws associated with this filing and with the TOB model, LSAP strongly urges the Commission to:

1. Deny the Petition and prohibit implementation of TOB; and

2. Disapprove the tariff language and agreements.

[1] CenterPoint Energy and the City of Minneapolis, In the Matter of Petition by CenterPoint Energy and the City of Minneapolis to Introduce a Tariffed On Bill Pilot Program, Docket No. G-008/M-21-377, *Petition* (September 1, 2021).
[2] Minnesota Public Utilities Commission, In the Matter of Petition by CenterPoint Energy and the City of Minneapolis to Introduce a Tariffed On Bill Pilot Program, Docket No. G-008/M-21-377, *Notice of Comment Period* (September 17, 2021).

LSAP is a statewide division of Mid-Minnesota Legal Aid, representing all low-income Minnesotans, including elder Minnesotans and Minnesotans with disabilities, in legislative and administrative forums. LSAP's advocacy spans the range of issues impacting Minnesota's low-income households, including access to – and affordability and preservation of – utility service. LSAP has appeared numerous times before the Commission on energy and telecommunications issues. LSAP appreciates the opportunity to provide comments in this docket.

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OVERVIEW

For the following reasons, LSAP urges rejection of the TOBF tariff in this docket:

1. TOB is legally defective. Its provisions conflict with statutory and common law.

2. The proposed TOB program design is fatally flawed. Inevitably, a percentage of participants will see less than the estimated savings or no savings whatsoever, and for some, usage may increase. These customers, though they will see no benefit, will bear all the cost, as will other nonparticipating ratepayers.

3. The purported consumer protections are woefully inadequate. Participants inappropriately – and illegally – would bear the risk of disconnection or denial of essential utility service, in violation of longstanding legal and regulatory doctrine, and contrary to existing rules, public policy, and the public interest.

4. It is illogical, unwise, and harmful to all ratepayers to create a new, separate, costly, complex, cumbersome, and administratively burdensome utility program infrastructure to deliver exactly the same energy efficiency services to low-income customers that CenterPoint currently delivers through a mature, proven, and recently expanded Conservation Improvement Program ("CIP").

LSAP participated in stakeholder meetings convened by the Proponents. The discussions at those meetings did nothing to allay – and in fact exacerbated -- LSAP's concerns about this proposal and TOB generally. Although minor changes have been made to this version of the proposal, the most glaring defects remain, giving rise to the most critical concerns that remain unaddressed. These fundamental and insurmountable issues were raised by consumer advocates in previous comments and by the Commission at its meetings held on January 12 and 14, 2021. These concerns have not been addressed by the Proponents in this filing. The Petition should be rejected.

THE PROPOSED TOB TARIFF IS LEGALLY DEFECTIVE

The Petition contains a myriad of legal defects, each of which, in and of itself, warrants denial. This proposal runs afoul of basic contract law. It violates Minnesota law regarding the transfer of utility debt. It asks the Commission to grant legal rights which the Commission does not have the power to grant to break purchase agreements and leases. It illegally shifts to tenants legal burdens which are statutorily and rightfully placed on landlords. It unconstitutionally attempts to interfere with obligations of contract. It improperly and dangerously interferes with real estate transactions. These legal defects doom the proposal.

At the Commission meeting of January 14, 2021 ("January 14th meeting"), Commissioner Means expressed concern about how this proposal violates "basic legal principles"[3] and fails to sufficiently address "numerous legal issues." These violations and issues remain unaddressed in this Petition. Further, the Petition does nothing to allay Commissioner Tuma's concerns, voiced at the Commission meeting of January 12, 2021 ("January 12th meeting"), about treading on ground outside its sphere and "delving into credit law, real estate law, rental law [where we] are not experts…"[4] The Petition continues to delve into – and conflict with law in -- these areas.

For all these reasons, the Commission should reject the Proponents' petition.

[3] Valerie Means, Commissioner, Minnesota Public Utilities Commission, Statement at Meeting of the Minnesota Public Utilities Commission (January 14, 2021); available at http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2& clip_id=1357.
[4] John Tuma, Commissioner, Minnesota Public Utilities Commission, Statement at Meeting of the Minnesota Public Utilities Commission (January 12, 2021); available at http://minnesotapuc.granicus.com/MediaPlayer.php?view_id= 2&clip_id=1354.

A. The Transfer of the TOB Debt Violates Minnesota Law

It is well-settled under Minnesota law that a utility cannot hold a subsequent customer liable for the previous customer's utility debt. This principle has been long-established by a line of cases including *Siegel v. Minneapolis Gas Co.* [5] and *Freeman v. Hayek*.[6]

Perhaps the definitive word on the matter comes from the Minnesota Supreme Court, which, in *Cascade Motor Hotel, Inc. v. City of Duluth*, declared that "[i]n absence of lien or contract, [a] utility may not impose obligation of payment for utility services on someone other than one who actually incurred debt."[7] Under this foundational precedent, TOB legally fails.

There is no lien or contract. Therefore, the debt cannot be transferred to a subsequent customer. The proponents admit that TOB does "not involve…placing a…lien on the property."[8] And, there is most certainly no contract (or lease) between the utility and the subsequent customer for the purchase or rental of the property.

Commissioner Sullivan focused on this crucial flaw at the January 14th meeting, declaring that the "[m]ust get around the really fundamental problems of passing debt on to the next person."[9] The Petition does not fix this incurable flaw. An agreement between a current owner and the utility simply cannot bind a future customer who was not a party to that agreement. This blatant violation of contract law alone is sufficient to warrant its rejection.

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[5] Siegel v. Minneapolis Gas Co., 135 N.W.2d 60 (Minn. 1965) (holding that a subsequent customer is not liable for debts of the previous customer, unless the previous customer continues to reside in the premises).
[6] Freeman v. Hayek, 635 F. Supp. 178, 184 (D. Minn. 1986) (holding that "disconnecting service based on the indebtedness of an unrelated prior person...violates the Equal Protection Clause of the Fourteenth Amendment.").
[7] Cascade Motor Hotel, Inc. v. City of Duluth, 348 N.W.2d 84, 84 (1984).
[8] *Petition*, Exhibit C, at 5.
[9] Joseph K. Sullivan, Commissioner, Minnesota Public Utilities Commission, Statement at Meeting of the Minnesota Public Utilities Commission (January 14, 2021); available at http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=1357.

B. The Proposed TOB Tariff Contravenes the Obligation to Serve

The "obligation to serve all who apply for service" is the bedrock principle of utility law.[10] That "[a] public utility is under a common law duty to serve" is one of the longest standing doctrines underpinning utility regulation.[11] The Commission has faithfully followed this doctrine, opining that "[t]he regulatory compact gives utilities exclusive service territories and requires utilities to serve the needs of the customers in its territory ("obligation to serve")."[12]

TOB does violence to this foundational obligation to serve. Any new customer, including a successor customer, has the right to unimpeded access to utility service.[13] A successor customer who does not want to take on the TOB debt they did not incur will be refused service for an impermissible reason.[14] There is no basis in law or doctrine to deny service under these circumstances. Thus, the TOB tariff is illegal because it contravenes CenterPoint's obligation to serve.[15]

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[10] Charles F. Phillips, Public Utilities in the American Economy (3d ed. 1993), at 118. *See also* State v. Consumers' Power Co., 119 Minn. 225, 137 N.W. 1104 (1912) (holding that franchised utilities have a duty to provide and maintain such service in the absence of reasonable specified justification for not doing so).

[11] Roger D. Colton, *Heightening the Burden of Proof in Utility Shutoff Cases Involving Allegations of Fraud*, 33 HOW. L.J. 137, 138 (1990) (citing, among others, *Liability of Public Utility for Temporary Interruption of Service, National Food Stores, Inc. v. Union Electric Co.*, *494 S.W.2d 379 (Mo. Ct. App. 1973)*, 1974 WASH. U. L. Q. 344 (1974) (highlighting a franchised utility's duty to provide adequate and continuous service in exchange for its franchise rights).

[12] In the Matter of the N. States Co. d/b/a Xcel Energy's Petition for A Pers. Prop. Tax Exemption for High Bridge Facility, No. E-002/TX-10-179, 2010 WL 3559436, at *3 (June 11, 2010). *See also* In the Matter of an Application by CenterPoint Energy for Auth. to Increase Nat. Gas Rates in Minnesota, No. 80-2500-30979, 2014 WL 1404646, at *119 (Apr. 9, 2014) (noting that utilities have "standing obligation to serve").

[13] For instance, the Commission's rules generally prohibit requiring a deposit to obtain utility service. Minn. R. part 7810.1500. And even if a deposit may be required, the reasons for demanding one are extremely narrow. *See* Minn. R. part 7820.4100 to 7820.4700.

[14] A utility may not deny service but is permitted to require a deposit from certain customers who has not established "good credit *with that utility*." *Id* (emphasis added). A successor customer unwilling to take a debt the previous customer incurred has not evidenced bad credit and therefore cannot be refused service. Effectively denying service because the customer is unwilling to take on a TOB debt is thus an impermissible denial.

[15] That the customer may receive some benefit from the conservation measures is of no significance. *See, e.g.,* Henske & Sons, Inc. v. Cold Spring Holding Corp., 39 A.D.2d 769, 769 (N.Y. App. Div. 1972) (holding that unless a person expressly assumes another's debt, that person is not responsible for it and the fact that the person "will gain the ultimate benefit of this transaction is of no moment.").

C. A Utility Meter Cannot Secure a Debt Obligation

There is no legal precedent for securing a debt through a utility meter, as is contemplated in the proposed tariff.[16] Debts are typically secured with real or personal property owned by the person incurring or assuming the debt.

Here, the property purporting to secure the debt – the utility meter -- is neither owned nor leased by either the original or the successor customer. At the same time, the utility has neither an interest in and nor lien rights against the actual real property. A security interest cannot be created in this manner. A utility meter cannot secure a debt incurred by a third party.

In contrast, debts owed to a municipality for water or other utility service, if unpaid by the original customer, become the obligation of the successor customer. Unlike a utility, a municipality is not a private actor but rather a sovereign governmental entity. Moreover, in that situation, the rights of the municipality exist only because the Legislature has conferred them.

Regarding TOB, legislative approval has been neither sought nor given. The party to whom the debt is owed is a private, investor-owned utility. Thus, the "debt stays with the meter" scheme proposed here is on dubious and exceptionally shaky legal ground.

[16] *Proposed Tariff*, at Proposed Original Page 31.b

D. The Proposed Tariff Violates Minnesota Landlord-Tenant Law and Will Harm Tenants

1. A Tariff Cannot Create the Right to Break a Lease

A tariff cannot create new statutory law or abrogate an existing statute. The proposed tariff does both. Under the proposed tariff, the TOB would create a right to break a lease for failure to disclose the TOB charge and debt.[17] In this way, the TOB purports to create a right the statute does not allow.

Minnesota's governing landlord-tenant law is found at Minnesota Statutes, Chapter 504B ("Chapter 504B"). Under Chapter 504B, there are only two ways a tenant can legally break a lease: (1) upon the tenant's death;[18] or (2) if the tenant is a victim of domestic or sexual violence.[19] Neither a tariff nor the Commission has the power to create the right to break a lease for failure to give the TOB notice. Thus, the proposed tariff which, without legal authority, attempts to grant a successor tenant the right to break a lease if the landlord does not disclose the existence of the TOB debt, is illegal and unenforceable.

Landlord-tenant law in Minnesota dates back to the birth of the state in 1858.[20] Courts have adjudicated lease disputes even longer.[21] The Commission acts *ultra vires* if it approves this provision. The Commission lacks authority to interfere with lease terms and create new rights only the Legislature can grant. For all these aforementioned reasons, the Commission must deny the Petition.

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[17] *See* Proposed Tariff, at Proposed Original Page 31; and *Petition* Exhibit G, at 3.
[18] Minn. Stat. § 504B.265.
[19] Minn. Stat. § 504B.206.
[20] See, e.g., Pub.St.1858, c. 77 (governing evictions).
[21] See, e.g., Lewis v. Steele, 1 Minn. 88 (1852).

2. The Proposed Tariff Raises Constitutional Concerns

The proposed tariff's provision conferring the right to break a lease constitutes an unconstitutional interference with and impairment of the obligation of contracts in violation of the United States Constitution and Minnesota's Constitution.[22]

Additionally, it is axiomatic that "[i]n the absence of an applicable and valid statute…liability for payment for utility services is based on usual contract law."[23] There is no applicable statute governing TOB. Though LSAP contends that legislative approval is a necessary prerequisite for the Commission to consider the TOB proposal, the Proponents have eschewed seeking the requisite legislative authority.

Inserting the purported right to cancel a lease in the proposed TOB tariff operates as "retroactively altering the law and the established contractual agreement between the parties [and] in essence… creating a new obligation in respect to a past transaction [which would] raise serious questions under the Contract Clause of the Federal Constitution…."[24] The TOB is fraught with legal problems.

[22] U.S. CONST., art. 1, § 10, cl. 1 (providing that "No State shall…pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"); MINN. CONST., art. 1, § 11 (providing that "No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed").
[23] Williams v. City of Mount Dora, 452 So. 2d 1143, 1146 (Fla. Dist. Ct. App. 1984)
[24] *Id. See also* Appeal of Pennichuck Water Works, 120 N.H. 562, 566, 419 A.2d 1080, 1083 (1980) (holding that a retroactive alteration of the law violates the Contract Clause).

3. The Proposed Tariff Illegally Shifts Landlords' Statutory Burden to Tenants

Minnesota's landlord-tenant statutes place the exclusive – and ongoing – duty on landlords to maintain their properties (the so-called "covenants of habitability").[25] Under the law, *tenants cannot be asked to pay for improvements to a landlord's property*. TOB would unfairly, unnecessarily, and illegally shift to tenants what is the landlord's legal burden.

One of those covenants specifically requires landlords to install "reasonable energy efficiency measures," which include storm windows.[26] An absurd result of approving this tariff is that tenants would not only wind up paying for, but also *financing*, measures that landlord is obligated to install and that are also eligible measures that could be installed at no cost under CIP.[27]

The covenants of habitability cannot be waived.[28] Under Chapter 504, a tenant may agree to "perform specified repairs or maintenance," but "*only if* the agreement is supported by adequate consideration and set forth in a conspicuous writing."[29] The tariff falls well short of meeting the conditions imposed by statute for allowing tenants to perform some maintenance because: (1) the TOB measures are neither repairs nor maintenance; and (2) the tenant receives zero consideration. The Commission cannot and should not entertain any proposal that would illegally alter the legal obligations imposed by law on landlords.

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[25] Minn. Stat. § 504B.161, subd. 1.
[26] *Id.*
[27] *Proposed Tariff*, at Proposed Original Page 31.a (providing that, among other things, "[e]ligible Upgrades are those that are…listed in the current version of the Minnesota Department of Commerce Technical Reference Manual."). Storm windows are included on the list of measures in the current Technical Reference Manual and thus eligible for installation at no charge under CIP. *See* Department of Commerce, *State of Minnesota Technical Reference Manual for Energy Conservation Improvement Programs, Version 3.2* (JANUARY 1, 2121), Effective: January 1, 2022 – December 31, 2022.
[28] Minn. Stat. § 504B.161, subd. 1(b).
[29] Minn. Stat. § 504B.161, subd. 2 (emphasis added).

4. Tenants Who Are Not CenterPoint Customers Are Especially Disadvantaged

This proposal will cause peculiar and considerable harm to tenants who are not CenterPoint customers but who nevertheless still pay utility bills to landlords through a statutory scheme known as "apportionment."[30] Under TOB, who were *never parties* to the original TOB agreement and *get no notice* of the additional TOB debt, are in an impossible adverse situation.

Although they will still pay the TOB surcharge through their landlord-provided, apportioned utility bill, they will see no bill reductions because they are not customers and pay no bills to the utility. Worse, landlords operate as de facto, *unregulated* utilities, with no oversight over their billing process or practices. Tenants in these circumstances would be unfairly subjected to utility bills and TOB surcharges from which they will not benefit and that have absolutely no relation to their usage.

5. High Mobility Makes It Unlikely that Many Low-Income Tenants Will Ever Benefit

Low-income renters move frequently.[31] A 2020 Johns Hopkins University study affirms that, "[u]nforeseen circumstances force low-income families to…move from one home to the next in a process that helps to perpetuate racial and economic segregation in the United States…."[32] With the eviction moratorium ended both here in Minnesota and nationally, the likelihood of further displacement is exacerbated.

[30] Minn. Stat. § 504B.215, subd. 2 (providing that a landlord may apportion "utility service payments among residential units [by] including utility costs in a unit's rent or billing for utility charges separate from rent.").
[31] During Commission deliberations, this fact was highlighted by both Commissioner Means and Commissioner Sullivan. *See* Commissioner Means, Statement (January 14th meeting) and Commissioner Sullivan, Statement (January 12th meeting).
[32] Doug Donavan, *Poor families must move often, but rarely escape concentrated poverty*, HUB (Johns Hopkins University), Oct. 8, 2020.

As one study concluded, it is "unlikely the frequently-moving population would enjoy long-term benefits from the [TOB] investment."[33] The incoming tenant may well be even more financially fragile than the departing tenant, and thus the harm to that tenant could be significant.

6. TOB is Ill-Suited to Multi-Family Settings

TOB is an extremely ill-fitting model for multifamily dwellings, and is very risky for tenants, especially (as noted above) those who are not CenterPoint customers but who will shoulder the costs through landlord-apportioned bills while seeing no benefit. Moreover, the 2021 Minnesota Legislature increased low-income CIP program spending for utilities by 200% and for electric utilities by 300%.[34] This includes additional spending for CenterPoint's Low-Income Rental Efficiency ("LIRE") Program, a fact acknowledged by CenterPoint in its petition.[35]

Multi-family programs should be handled exclusively under CIP because of the risks and uncertainties for tenants, the complexities and varying arrangements of tenants in these dwellings, and the substantial boost to CIP spending on multi-family dwellings. Consequently, the Commission should reject the Petition. However, if the Commission were to approve the petition, it should exclude tenants in multi-family dwellings from TOB.

[33] Leah Burcat and Meg Power, *On-Bill Repayment for Home Energy Efficiency: The Benefits and the Risks, Economic Opportunity Studies*, (February 2013), at 17; at https://communityactionpartnership.com/wp-content/uploads/2018/11/ On-Bill-Repayment-for-Home-Energy-Efficiency-Benefits-and-Risks.pdf

[34] 2021 Minn. Laws, ch. 29, sec. 14 (codified at Minn. Stat. § 216B.241, subd. 7).

[35] *Petition,* at 8 (admitting that "CenterPoint Energy must meet new minimum low-income spending requirements due to the passage of the Energy Conservation and Optimization Act ("ECO")).

E. The Commission Has No Legal Authority to Cancel a Purchase Agreement

The TOB tariff would confer the power on a home buyer to "break [the] purchase agreement without penalty"[36] if the seller fails to provide the required notice and permit the buyer to "seek consequential damages from the previous owner."[37] Like similar provisions in regarding leases, these provisions are illegal and unenforceable.

The Proponents cite no legal authority that would grant the power to a tariff (or the Commission) to confer this power or create a private right of action. LSAP could find no such authority in statute or case law. A tariff can neither create statutory law nor abrogate the common law to confer a right to break a contract or establish a private right of action.

Moreover, the tariff purports to confer rights and impose obligations in a contract on persons who were not parties. CenterPoint (through the tariff) would confer a right on a homebuyer to break a contract with a seller, yet CenterPoint was not a party to that contract. Similarly, CenterPoint (through the tariff) would impose the TOB obligation on a homebuyer, yet the buyer was not a party to the original agreement between the utility and the seller. As the Minnesota Court of Appeals has made crystal clear: "[u]nder Minnesota law, strangers to a contract acquire no rights under the contract.[38] The Commission (or any tariff it may approve) lacks the power to dictate terms of, or interfere with, a contract between two unrelated parties, a problem not only of authority but also of questionable constitutionality.[39]

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[36] *See* Proposed Tariff, at Proposed Original Page 31; and *Petition* Exhibit G, at 3.
[37] *Petition***,** Exhibit C, at 5.
[38] Wurm v. John Deere Leasing Co., 405 N.W.2d 484, 486 (Minn. Ct. App. 1987) (citing Anderson v. First Northtown Nat'l Bank, 361 N.W.2d 116, 118 (Minn.Ct.App.1985).
[39] *See* discussion regarding how the tariff would appear to offend the obligations of contracts provisions of both the United States and Minnesota Constitutions, *infra,* p. 10.

F. The TOB Tariff Unduly Interferes with the Real Estate Market

Even if the provisions purporting to grant the power to a buyer to cancel a purchase agreement were legal, TOB raises other serious concerns regarding the alienation of property. For instance, one TOB study notes that "lenders are likely to treat [TOB] as an obligation to be cleared before a property is transferred rather than a routine utility bill for electricity or gas service."[40] Another analyst observes:

> In the typical home sale transaction, the buyer obtains the property 'free and clear' of prior obligations. The buyer's mortgage lender typically makes paying-off and clearing all prior obligations a condition of closing. It is not clear whether a home buyer (and mortgage borrower) would be permitted by the mortgage lender to purchase a property subject to an open [TOB] loan obligation, or what effect the ongoing obligation would have on the purchase price, appraised value, or title insurance.[41]

As the analyst urges, "[t]o steer clear of pitfalls, it is important...to work closely with the real estate…industry…so that any on-bill loan will dovetail with other real estate financing functions and interests."[42] In this case, the Proponents not only have not worked closely with the Realtor association, they disingenuously report to the Commission that the "tariffed on-bill investment in home energy upgrades [has] been discussed with realtors."[43] They indicate that one city division has elicited an initial positive reaction from a single local realtor association.[44]

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[40] The State and Local Energy Efficiency Action Network, *Financing Energy Improvements on Utility Bills: Market Updates and Key Program Design Considerations for Policymakers and Administrators* (May 2014), at 26; at https://www4.eere.energy.gov/seeaction/system/files/documents/onbill_financing.pdf.
[41] Philip Henderson, *On-Bill Financing: Overview and Key Considerations for Program Design*, NRDC Issue Brief, 4 (2013); at https://www.nrdc.org/sites/default/files/on-bill-financing-IB.pdf.
[42] *Id.*
[43] *Petition,* Exhibit C, at 5.
[44] *Id.*

A cursory conversation with an entity that does not represent the state real estate industry is hardly a fully vetted and official position by the industry on the entirety of the TOB proposal.

The assertion of industry support utterly fails to acknowledge and address the concerns of Minnesota Realtors,® the statewide voice of the industry. These industry spokespeople have previously warned that the design of TOB "raises concerns with how lenders will treat that outstanding obligation" and "creates a question whether a buyer or lender [would be] willing to assume [repayment] responsibility, which means an owner of a property with [TOB] who wants to sell may have trouble finding a buyer."[45] At the Commission meeting of January 14, 2021, Commissioner Means recognized the concerns raised by Minnesota Realtors® and expressed worry about "complications homebuyers would face" if TOB were put in place.[46]

G. The Proposed TOB Tariff Seemingly Holds Noncustomers Liable for TOB Charges

TOB appears to hold the original homeowner liable *even after they have vacated the premises* and hold the successor homeowner liable *even before they have taken possession*. The "Participant Owner Agreement" reads: "If there is no customer at the Property for a period of time, the Term of this Agreement will be extended for an equivalent period of time and the Utility *will continue to collect Upgrade Service Charges from Current or Future Customers* at the Property during that extended Term."[47] A tariff cannot hold customers responsible for charges for which they are not legally liable.

[45] Minnesota Realtors®, *Letter to Commissioners*, Docket No. G-008/GR-19-52, August 20, 2020, at 1-2. They renew these concerns in their comments in this docket. Minnesota Realtors®, *Letter to Commissioners*, Docket No. G-008/M-21-377, January 11, 2022.
[46] Commissioner Means, Statement (January 14th meeting).
[47] *Participant Owner Agreement*, at 2.

PARTICIPANTS WILL BE HARMED BECAUSE ESTIMATED SAVINGS WILL NOT NECESSARILY MATERIALIZE

The foundational theory that underpins the entire TOB model is that, at the end of the day, "savings estimates" will always exceed payments.[48] However, the promise of TOB savings is elusive and often illusory. In fact, in evaluations of other TOB programs around the country, this premise that savings always equal or exceed payments has been proven to be false.

Under TOB, the only time a customer who does not achieve estimated savings gets relief is if measures fail.[49] This rarely happens. Customer behavior and lifestyle changes, among many other factors, are the principal causes of actual savings falling short of estimates.[50] As a result, as experts note, regardless of the measures installed, "energy savings achieved in practice...will be lower than those calculated in engineering conservation studies."[51]

In the ironically -- and inaccurately – titled tariff section, "Assurance of Savings," the proposed tariff calls the annual audit to determine *if* there are any savings.[52] In point of fact there *is* no assurance or guarantee of savings and no provisions to make participants whole when savings fail to materialize. The lower the household's income, "the greater its risk regarding loan affordability, given the lack of budget flexibility and the margin of error that is necessarily a part of bill neutrality calculations."[53] Therefore, TOB places all homeowners and renters – but especially those at the lower income levels -- at unreasonable and undue risk.

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[48] *Petition*, Exhibit A, at 2.
[49] *Participant Owner Agreement*, at 4 and *Participant Renter Agreement*, at 4.
[50] Reinhardt Hass, Hans Anuer, and Peter Biermayr, *The Impact of Consumer Behavior on Residential Energy Demand for Space Heating*, 27 ENERGY AND BUILDINGS (1998), at 195.
[51] *Id.*
[52] *Proposed Tariff,* at Proposed Original Page 31.a (emphasis added).
[53] Chris Kramer, Consultant to the Connecticut Energy Efficiency Board, Disconnection and On-Bill Repayment (2014), at 16; at http://utilityproject.org/wp-content/uploads/2014/04/OBR-Report-for-CT-EEB-4-2-14.pdf..

A. Claims of Success Elsewhere are Based on Inapt Comparisons

The Proponents based their claim that TOB will succeed in CenterPoint's gas service territory on their research of TOB "implemented by electric cooperatives and municipalities."[54] They cite only one public utility -- in Missouri – that has yet to actually implement a TOB program.[55] The Proponents' unqualified confidence is misplaced.

In their rate case testimony, the City touted TOB programs at "three Rural Electric Cooperatives in three states: Arkansas, Tennessee, and North Carolina."[56] Comparing existing programs operated by small, rural, cooperative, electric utilities in warm Southern climates to a large, urban/suburban, investor-owned, natural gas utility in a cold Northern climate is an inapt and dangerous apples to oranges comparison.

Further, self-interested testimony by a City witness in the rate case claimed that "all [TOB] participants can pay lower bills; and they have done so."[57] Those claims are based on the results of a program operated by that same third-party administrator for the Ouachita Electric Cooperative Corporation in Arkansas that is line to administer CenterPoint's TOB. An outside evaluation of the Ouachita program, retained by the very same administrator, revealed that *17% of participants failed to realize the promised savings.*[58]

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[54] CenterPoint Energy and the City of Minneapolis, In the Matter of Petition by CenterPoint Energy and the City of Minneapolis to Introduce a Tariffed On Bill Pilot Program, Docket No. G-008/M-21-377, *Initial Filing and Progress Report* (June 1, 2021), at 3.

[55] *Id.* It also should be noted that Missouri does not have a statutorily required and robust CIP-type program as does Minnesota.

[56] City of Minneapolis, In the Matter of the Application by CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas for Authority to Increase Natural Gas Rates in Minnesota, Docket No. G-008/ GR-19-524, *Direct Testimony of Tammy Agaard* (filed July 15, 2020).

[57] *Id.* at 9.

[58] Optimiser LLC, *Ouachita HELP PAYS Residential Energy Efficiency Program Evaluation* (February 2018), at 4; at https://mplscleanenergypartnership.org/wp-content/uploads/2018/04/Ouachita_PAYS_Report.pdf.

It would be folly to rely on the results of an Arkansas electric program to predict, let alone assert with any degree of certainty, that a gas TOB will succeed in Minnesota. Findings from similar TOB programs in Delaware and Oregon, which showed success rates of only 34% and 47%, respectively, also cast doubt on any claim that actual results will meet estimates and predictions with regularity.[59] Another study sums up the problem: "[h]istorically, the variance in actual [TOB] energy savings versus estimates across individual participants has been substantial."[60] Thus, as one study noted, banking on "energy savings to repay financing [when] those savings fail to materialize...may actually increase risk."[61] In fact, some TOB participants could experience "higher total bills after [installation of the] efficiency improvements."[62]

B. TOB Punishes Customers for Having a Family or Purchasing an Appliance

If estimated savings fail to materialize, the tariff treats participants harshly. Participants falling short of estimated savings will continue if "the program administrator determines…a change in behavior by occupants at the Property or a change in Property characteristics (e.g. a building expansion, new major appliances)" is the reason.[63] Sadly, customer behavior is precisely the most likely cause of program failure and, thus, customer harm. There are many life and situational changes the occur or befall customers.

[59] Mitchell Rosenberg, *The Resource Value of Whole House Retrofit Evaluated Experience of Established Programs,* presented at 2013 ACEEE Energy Efficiency as a Resource Conference, Nashville (Sept. 23, 2013), at 9; at https://www.aceee.org/files/pdf/conferences/eer/2013/1A-rosenberg.pdf. The paper also showed savings in a New Hampshire program were only 53% of estimated savings and, in New York, ranged from as little as 35% to 67% of estimates. *Id.*

[60] The State and Local Energy Efficiency Action Network, *supra* note 40.

[61] *Id.*

[62] Henderson, *supra* note 41, at 3.

[63] *Participant Owner Agreement*, at 4, and *Participant Renter Agreement*, at 4.

In some cases, a spike in usage will be caused by circumstances beyond the customer's control – such as extended periods of extreme cold weather. If a customer encounters that situation, savings will be eroded or eliminated, or cause baseline usage to rise. Under these circumstances, the program penalizes the customer.

In other cases, changes in customer's lives – like an increase in family size or the purchase of an appliance -- will cause participants to see no savings or perhaps even use more energy. In fact, at the stakeholder meeting held on July 16, 2021 (and referenced in the Petition), CenterPoint's General Counsel admitted that one "obvious" customer behavior that would not result in any remedy for the participant is if the original participant were "a single person, then family of five moves in."[64]

These "behavioral" or external changes are neither unusual nor infrequent. As a result, the TOB scheme punishes customers for living their lives. When these inevitabilities arise, the Proponents' response is: "Sorry. Too bad. Out of luck."

At the same time, the program expects participants to be experts in ensuring savings are realized and persist. In reality, most have a rudimentary, if any, understanding of how energy systems and installations work and what behaviors should be practiced or avoided to maximize efficiency and savings.

[64] Statement of Erica Larson, General Counsel, CenterPoint Energy, at Tariffed On Bill Pilot Meeting for Interested Parties on Participant Noticing and Disclosures, July 16, 2021 (referenced in *Petition*, pps. 3-4).

As a study from the American Council for an Energy-Efficient Economy notes, with respect to low-income programs, "[e]ducation is a *key* component…"[65] Yet, under this proposal, there is absolutely no energy education built in. TOB is unforgiving if savings do not materialize because participants are not energy savvy. Under TOB, participants are sent up the energy creek without an education paddle.

In sum, as one national low-income energy expert concludes, TOB "is not a good residential choice."[66] The following Philadelphia Gas Works analysis of TOB sums it up:

> [A] building's energy usage may increase (or decrease) due to changes that have nothing to do with efficiency...There are innumerable extraneous factors, not related to the efficiency investment, that can and will affect whether a customer's energy efficiency investment will yield bill neutrality. The factors that will impede achieving bill neutrality are frequently associated with household characteristics. Household factors such as household composition, household behavior and household appliances will all affect whether the household experiences bill neutrality as a result of any given energy efficiency investment [and] change in household size, subsequent changes to the structure [and the], addition of energy-using household equipment.[67]

[65] Rachel Cluett, Jennifer Amann, and Sodavy Ou, *Building Better Energy Efficiency Programs for Low-Income*, Report Number A1601 (Washington, D.C.: American Council for an Energy-Efficient Economy, March 2016), at 23 (emphasis added).
[66] Roger Colton, *On-Bill Financing of Energy Efficiency: Not a Good Residential Choice*, FSC'S LAW & ECONOMICS INSIGHTS, Issue 15-04 (July-August 2015), at 2.
[67] *Id.*

C. Bill Neutrality is Essential

TOB punishes participants for having a family, for improving their lifestyle, or because of circumstances beyond their control. Because of the punitive nature of the proposal's treatment of participants where savings are not less than or exceed costs, TOB sets them up to fail

The tariff proposal speaks loudly in its silence regarding making participants whole if their savings do not materialize, effectively blaming them for the failure to achieve the estimates. LSAP has been consistent in advocating that, if TOB is to move forward, participants – at the very least, low-income participants – must be held harmless in the event that savings do not equal or exceed costs. Chair Sieben made it crystal clear at the January 14th meeting that "net bill neutrality" is "important to achieve approval."[68] Yet, bill neutrality is <u>not</u> a part of TOB. The Petition should be denied.

[68] Katie Sieben, Chair, Minnesota Public Utilities Commission, Statement at Meeting of the Minnesota Public Utilities Commission (January 14, 2021); available at http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2& clip_id=1357.

THE PROVISIONS ALLOWING DISCONNECTION ARE ALARMING AND NOT IN THE PUBLIC INTEREST

A host of consumer protection issues are raised by -- and remain unaddressed -- in the Petition. Most worrisome is the TOB provision allowing disconnection of utility service for nonpayment of energy improvements.[69] CenterPoint's customers -- especially CenterPoint's low-income customers -- should not be placed at risk of losing essential utility service necessary for cooking and heating for participation in a program where savings are merely promised but not guaranteed and, as demonstrated, will not always come to pass.

At the January 12th and 14th meetings, grave concerns were expressed by the Commission about allowing disconnection for TOB defaults. Commissioner Means, for instance, found this aspect of the proposal "particularly troubling," lacking any grounds to support it, and "not reasonable."[70]

The Proponents purport to have addressed stakeholder concerns by proposing several additional "protections" for TOB pilot participants, which include issuing more threatening notices, making more robocalls, and assessing late fees.[71] These "protections" are unavailing and do not address or allay LSAP's concerns about this aspect of the proposal. The tariff should be rejected, but if it is approved, then disconnection for nonpayment of the TOB surcharge should be prohibited.

[69] *Proposed Tariff,* at Proposed Original Tariff Page 31.b. This iteration of the proposal does provide that customers with existing payment agreements would be saved from disconnection, but not all have existing payments agreements and this addition does not protect all from disconnection. Further, there is no explanation of how the TOB surcharge interacts with the Cold Weather Rule. *See* Minn. Stat. § 216B.096.
[70] Commissioner Means, Statement (January 12th and 14th meetings).
[71] *Petition*, at 20.

A. The Tariff Would Permit What the Rules Prohibit

Under Minnesota Rules, disconnection is impermissible for nonpayment of "equipment or service" that is not "*an integral part of the utility service*."[72] At the January 12th meeting, Commissioner Sullivan called this rule "one of the most important consumer protections we have."[73]

Yet, the proposed tariff would turn this protection on its head, permitting what this "most important consumer protection" otherwise prohibits. The TOB provision permitting disconnection for nonpayment of the surcharge violates the spirit of Minnesota Rules, tramples on settled law, and offends the public interest. A deeper analysis reveals the length to which this proposed tariff goes to contort the law to evade this sacrosanct protection against the loss of critical utility service. In short, TOB is not even a service, let alone an essential one.

In what is still good law, the Minnesota Court of Appeals has held that "[e]nergy conservation improvements *are not 'service'* as defined by [Minnesota statute]."[74] Thus, TOB conjures up a legal fiction and, by policy alchemy and absent any legal or justifiable basis, turns the TOB improvements into "an essential part of the Customer's bill for gas service."[75] It improperly proposes to grant CenterPoint the disconnection power to which it is not entitled. [76]

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[72] Minn. R. part 7810.2000 (emphasis added).

[73] Commissioner Sullivan, Statement (January 12th meeting). *See also* Chair Sieben, Statement (January 12th meeting) (expressing skepticism that this program element should "rise to that threshold where a family should have their service disconnected because they weren't able to make a portion of their bill that would be applied to those programmatic costs.").

[74] Matter of Implementation of Util. Energy Conservation Imp. Programs, 368 N.W.2d 308, 313 (Minn. Ct. App. 1985) (emphasis added). In a legal analysis prepared by a prominent local law firm for the CenterPoint and the City confirms that the TOB program does not offer "services" within the statutory definition. *See* Winthrop & Weinstine, *Inclusive Financing on Utility Bills*, at 2.

[75] *Proposed Tariff,* at Proposed Original Page 31.b.

[76] *Id.* (proposing to allow CenterPoint the ability to "disconnect [the] premise for non-payment of [TOB] Service Charges.").

Because energy improvements are not "service," enabling legislation was required to bring CIP within the Commission's jurisdiction. In 1980, the Legislature acknowledged that conservation is not service and created – by statute – the power of the Commission to treat CIP "investments and expenses [for inclusion in rates] *as if* the investments and expenses were directly made or incurred by the utility in furnishing utility service."[77]

The Proponents have pointedly rejected the urging of the Commission to modify TOB and place it under the CIP umbrella.[78] If it were a CIP program, then no legislative action would be needed, because the Legislature waved its magic wand and deemed CIP "a service" to bring it within Commission jurisdiction. Further, embedding TOB as a CIP program, as Commissioner Sullivan reasoned at the January 14th meeting, would avoid the steep "administrative learning curve, [resolve] many of the issues of concern have already been contemplated in CIP, [and avoid] thorny cost recovery, assignment of customer debt, utility bad debt, legal and shutoff concerns that the TOB program has."[79]

In sum, wishing something to be so does not make it so. TOB tortuously twists existing law to ask the Commission to impermissibly expand shutoff power through a tariff. Any such expansion would, at a minimum, would require a rulemaking but more likely, an enabling statute to again write legal fiction to, like CIP, bring TOB within the ambit of permissible reasons to disconnect.

[77] 1980 Minn. Laws, ch. 579, sec. 16 (codified at Minn. Stat. § 216B.16, subd. 6b) (emphasis added).
[78] Commissioner Sullivan, Statement (January 14th meeting).
[79] *Id.*

B. TOB Places Already Financially Fragile and Energy Insecure Households at Undue Risk

The economic status of many lower-income households is tenuous.[80] Circumstances (e.g., job loss) or unexpected expenses (e.g., a car repair) may create a barrier to repaying the TOB loan.[81] As recently as January 2019, a national survey found that 60% of American households cannot meet a $1,000 unexpected expense.[82] And that was before the pandemic.

As Commissioner Means correctly observed at the January 14th meeting, as a result of their financial fragility "low-income households already struggle with energy security."[83] This is so, in part, because "low-income households face a disproportionately higher energy burden."[84] The National Institutes of Health reports that low-income households spend twice as much of their total household income on energy as do middle- and upper-income households, and "the very poor...are likely to spend an upwards of 20 percent on energy purchases."[85] Adding debt to a customer in this precarious situation is dubious policy.

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[80] *See e.g.,* Richard Mertens, *Economic Instability and the Everyday Struggles of Families,* 25 THE UNIVERSITY OF CHICAGO SCHOOL OF SOCIAL SERVICE ADMINISTRATION MAGAZINE (2018) (reporting findings that almost all study households with an annual income that lifted them above the federal poverty level fell back into poverty for at least one month of the year; a third of households earning twice the poverty level also experienced at least one month of poverty) (citing Jonathan Morduch and Julie Siwicki, *In and Out of Poverty: Episodic Poverty and Income Volatility in the U.S. Financial Diaries*, SOCIAL SERVICE REVIEW 91: (3) 390-421 (2017); at https://ssa.uchicago.edu/ssa_magazine/economic-instability-and-everyday-struggles-families).

[81] Kramer, note *supra* note 53, at 12.

[82] Adrian D. Garcia, *Survey: Most Americans Wouldn't Cover a $1K Emergency with Savings*, BANKRATE, Jan. 16. 2019; at https://www.bankrate.com/banking/savings/financial-security-january-2019/.

[83] Commissioner Means, Statement (January 14th meeting). Commissioner Means' assertion is supported by the National Consumer Law Center. *See* John Howat and Olivia Wein, *Reaction to Tom Stanton and Scott Sklar's Paper "Utility Tariff On-Bill Financing: Provisions and Precautions for Equitable Programs*, NRRI INSIGHTS (January 2020), at 7 (footnoting that "[i]n 2015, 20 percent of U.S. households with annual income of less than $20,000 reported keeping their home at an unhealthy temperature, and 23 percent reported receiving a utility disconnection notice (U.S. Energy Information Administration, 2015 Residential Energy Consumption Survey)").

[84] United States Department of Energy, Office of Energy Efficiency & Renewable Energy, *Low-Income Community Energy Solutions*; at https://www.energy.gov/eere/slsc/low-income-community-energy-solutions. "Energy burden" refers to the percentage of household income used to pay utility bills. *See* United States Department of Health and Human Services, Administration for Children and Families, *Benefits*; at https://liheapch.acf.hhs.gov/delivery/benefits.htm.

[85] Diana Hernandez & Stephen Bird, *Energy Burden and the Need for Integrated Low-Income Housing and Energy Policy*, 2 POVERTY & PUB. POL'Y 4, 7-8 (2010).

When expenses exceed income, many low-income households are forced to decide whether to pay the utility bill or forgo other necessities. These so-called "heat or eat" choices can result in deprivation, suffering, and adverse health and safety consequences.[86] The National Energy Assistance Directors Association found "that 38% of [low-income] households went without medical or dental care...30% went without filling a prescription or taking the full dose of a prescribed medicine; and 22% went without food for at least a day, including 10% of elderly homeowners."[87] The interrelationship between energy insecurity and health disparities is well-documented. Low-income utility customers endure disproportionate and adverse health conditions.[88] Thus, the "[l]oss of [utility service] in these scenarios can place members of the household at risk of experiencing serious medical problems."[89]

Further there can be collateral financial consequences to disconnection. Not only does a loss of utility service pose a health and safety threat, but it also carries "substantial penalties...including charges for reconnection and increased security deposits."[90] TOB should be rejected as against public policy.

[86] *See, e.g.*, Dr. Jayanta Bhattacharya, Dr. Thomas DeLeire, Dr. Steven Haider, and Dr. Janet Currie, *Heat or Eat? Cold-Weather Shocks and Nutrition in Poor American Families*, 7 AM J PUBLIC HEALTH 93 (2003) (describing difficult decisions faced by low-income families about where to place their resources).
[87] Kramer, *supra* note 53, at 11 (citing "National Energy Assistance Survey Report," National Energy Assistance Director's Association, April 2004; at http://neada.org/wp-content/uploads/2013/05/survey2004.pdf).
[88] See, e.g., Lisa Esposito, *The Countless Ways Poverty Affects People's Health*, U.S. NEWS & WORLD REPORT, April 20, 2016; at https://health.usnews.com/health-news/patient-advice/articles/2016-04-20/the-countless-ways-poverty-affects-peoples-health.
[89] Kramer, *supra* note 53, at 10.
[90] Burcat and Power, *supra,* note 33, at 11.

C. Ability-to-Repay is Not Considered

It is true that the use of traditional underwriting criteria has been a barrier to some households in obtaining financing for energy efficiency and a driver of inequitable access to credit for low-income borrowers and borrowers of color. But, as was evident during the Foreclosure Crisis and is evident still today with respect to payday loans, too much laxity in evaluating a borrower's ability to repay a loan can seriously jeopardize the borrower's future financial stability and social mobility should there be a financial bump in the road or the benefits promised do not materialize.

One of the TOB program design characteristics touted by the Proponents – the lack of a credit check – is a double-edged sword. Before allowing a customer to take on new debt, a basic determination of whether that debt is affordable is important to make. And even if financial screening were provided for the original participant, what about the involuntary successor participant? Neither the original nor the successor participant will be assessed for ability to pay. But, the successor "might have different usage" or have different financial circumstances, making repayment more difficult and jeopardizing that successor's service. [91]

[91] American Council for an Energy-Efficient Economy, *On-Bill Energy Efficiency* (Feb. 5, 2020); at https://www.acee.org/Toolkit/2020/02/bill-energy-efficiency.

ESTABLISHING A NEW, ADMINISTRATIVELY BURDENSOME PROGRAM IS ILLOGICAL AND ILL-ADVISED

TOB proposes to deliver the same energy efficiency services that can be obtained at no cost and at no risk through CIP and other long-established programs, such as the federal Weatherization Assistance Program. Here, the Proponents would, by their own admission, undertake to create a "program…unlike anything previously offered by any Minnesota utility [that] will require a significant investment by CenterPoint Energy to adjust systems and processes to offer this…program."[92] The plan entails an *eight-step process requiring significant personnel and other administrative resources at a cost of $25.7 million,* a cost that will be borne, at least in part, by ratepayers.[93]

The Proponents have offered little in the way of justification to establish a new, separate, costly, complex, cumbersome, and administratively burdensome TOB program when CIP already exists and is both highly functional and proven to be successful. This same sentiment was firmly expressed at the January 14th meeting, when Commissioner Sullivan urged the Proponents to avoid all the inherent and insurmountable problems with TOB when CIP presents "the perfect vehicle for developing a program to help folks in need."[94]

[92] *Petition*, at 23.
[93] *Id.* at 10 – 12.
[94] Commissioner Sullivan, Statement (January 14th meeting).

TOB PRESENTS MANY OTHER PROGRAMMATIC PROBLEMS

The legal defects and troubling programmatic elements of TOB already noted are sufficient in and of themselves to sink this proposal. But those are not the only problems inherent in the TOB proposal.

A. TOBF is Bereft of Typical Lending Protections

Both the United States Department of Energy and the Natural Resources Defense Council describe TOB as a "loan."[95] It is an extension of financing by a third party, repaid over time, with interest. The Proponents stubbornly maintain that it is not a loan,[96] preferring to call it a "payment obligation."[97] Whatever it is called, it is a debt that must be repaid.

But, unlike Minnesota's *statutory* On-Bill Repayment Program (OBR) – a CIP program, incidentally -- traditional lending protections and disclosures are absent. Under OBR, lenders must "comply with all applicable federal and state laws, rules, and regulations related to lending practices and consumer protection" and "conform to reasonable and prudent lending standards."[98] These same protections are missing under TOB.

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[95] United States Department of Energy, Office of Energy Efficiency & Renewable Energy, *On-Bill Financing and Repayment Programs* (characterizing TOB as "a loan [that is] transferable to the next owner of the home or building"); at https://www.energy.gov/eere/slsc/bill-financing-and-repayment-programs; and Henderson, *supra* note 41, at 1 (including TOBF in the umbrella term "on-bill financing" and asserting that this type of program "refers to a loan made to a utility customer…the proceeds of which would pay for energy efficiency improvements."). *See also, e.g.,* Deborah Behles*, From Dirty to Green: Increasing Energy Efficiency and Renewable Energy in Environmental Justice Communities,* 58 VILL. L. REV. 25, 47–48 (2013) (explaining about the multi-family component that "[t]he on-bill financing is tied to the unit's meter, and when a renter moves, the renter is not responsible for repayment of the rest of the loan.").

[96] *Petition,* Exhibit C, at 2. Similarly, proponents of the Property Assessed Clean Energy (PACE) program – where, like TOB would, the debt stays with the property – vociferously contended this financing was not a loan but instead a property assessment. The Minnesota Legislature disagreed, calling a spade a spade. *See* Minn. Stat. § 216B.435, subd. 10e (defining "Residential PACE *loan*" as "the extension of financing that is offered to pay for the installation of cost-effective energy improvements on a homeowner's qualifying residential real property and is repayable by the homeowner through a special assessment.") (emphasis added).

[97] See *Petition*, Exhibit G, at 2.

[98] Minn. Stat. § 216B.241, subd. 5b.

In addition, consumer protections available to borrowers under the similar PACE program are conspicuously absent in the proposed tariff for TOBF borrowers. Unlike TOB, borrower protections under PACE include: (1) an underwriting (ability-to-repay) analysis requirement;[99] (2) a list of prohibited practices, including a prohibition on a representation or implication that the measures will pay for themselves;[100] (3) comprehensive statutory disclosures of the risks and benefits of participation in the program, including disclosures in other languages;[101] (4) legal accountability of the program administrator to the PACE participant;[102] and (5) legal remedies.[103] None of these protections are contained in the proposed TOBF tariff.

B. Referral to Free Energy Efficiency Alternatives is Inadequate

The Proponents claim that the third-party vendor hired by CenterPoint to administer TOB will conduct "pre-screening" to, among other things, "educate all customers… about CIP and no-cost income qualified services."[104] There are two problems with this approach. First, there is an inherent conflict of interest with the third-party administrator providing the information on TOB alternatives because the administrator has a self-interested incentive to steer the prospective participant to TOB.[105] Second, the successor will not learn of – or have the option to choose – an alternative program. The successor participant is captive.

[99] Minn. Stat. § 216B.437, subd. 17.
[100] Minn. Stat. § 216B.437, subd. 24.
[101] Minn. Stat. § 216B.437, subd. 27.
[102] Minn. Stat. § 216B.437, subd. 31.
[103] Minn. Stat. § 216B.437, subd. 32.
[104] *Petition*, at 10.
[105] *See* Minnesota Public Utilities Commission, In the Matter of the Application by CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas for Authority to Increase Natural Gas Rates in Minnesota, Docket No. G-008/GR-19-524, *Direct Testimony of Kim Havey* (filed July 15, 2020), at 13 (explaining "EEtility has indicated that they can do 2,000 homes in the first year and up to 4,000 homes in each succeeding year" under the pilot. EEtility is the

C. Costs of Financing and Impact on Ratepayers

Under the Proponents' TOB proposal, the cost of capital is at the utility's rate – currently 7.42%.[106] Nearly 5% of that will be borne by ratepayers. While the mature CIP program has proven to be a net benefit to ratepayers for the costs they bear, TOB is asking the Commission to buy a pig in a poke. As Commissioner Sullivan noted, TOB "increases rates. Minnesotans are going to be paying for this."[107]

Moreover, while the proposal purports to allocate only 2.5% of that interest rate to participants[108] (in addition to a $475 "program operation fee"),[109] there are several unanswered questions: aren't participants also ratepayers; isn't their "allocated share," contained in the TOB surcharge, a mere illusion because they will wind up paying the additional 4.92% through their regular rates? If that is so, asking participants to pay almost 7.5% interest seems like gouging.

company for whom the City's witness works and the witness was also present at the stakeholder meetings, advocating for TOB).

[106] *Petition*, p. 14, fn 34.

[107] Commissioner Sullivan, Statement (January 12th meeting).

[108] *Id.* at p. 15, fn 36.

[109] *Proposed Tariff,* Proposed Original Page 31.

THE COMMISSION LACKS JURISDICATION TO CONSIDER TOB

Whether the Commission has jurisdiction over this matter remains in doubt. LSAP continues to assert that enabling legislation is required to allow the Commission to take up TOB.

The Commission has legislative authority over public utilities providing natural gas and electric *service*.[110] Under Minnesota statutes, "service" is narrowly defined as the gas or electricity commodity itself or its delivery or measurement.[111] The Commission has authority only over "service." As previously noted, the Minnesota Court of Appeals has ruled that "[e]nergy conservation improvements are not 'service' as defined by [statute]."[112]

If TOB were proposed as a CIP program, the jurisdictional question would be moot. But because TOB is expressly *not* a CIP component, the jurisdictional issue persists. The Commission has jurisdiction over CIP improvements only because the Legislature has *deemed* such improvements "service."[113] TOB is not a CIP program. Unlike CIP, it has not been deemed "service" by the Legislature. The Commission is without jurisdiction over it.

[110] *See* Minn. Stat. §§ 216B.01 (providing that it is in the public interest to regulate public utilities providing "natural gas and electric service in this state") and 216B.04, subd. 4 (defining public utilities as persons or entities "operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public…").
[111] Minn. Stat. § 216B.02, subd. 6 (defining "service" to mean "natural, manufactured, or mixed gas and electricity; the installation, removal, or repair of equipment or facilities for delivering or measuring such gas and electricity.").
[112] 368 N.W.2d at 313.
[113] Minn. Stat. § 216B.16, subd. 6b (providing that "investments and expenses…incurred in connection with [CIP] energy conservation improvements shall be recognized and included by the commission in the determination of just and reasonable rates *as if* the investments and expenses were directly made or incurred by the utility in furnishing utility service.") (emphasis added).

The Office of the Attorney General (OAG) agrees. OAG asserts that "the Commission lacks the authority to approve the proposed pilot…because the service that the pilot would offer does not meet the statutory definition of utility service, nor does it involve rates for utility service."[114]

The Department of Commerce ("the Department") concurs. The Department believes that "the Commission is without statutory authority to approve the TOB program because it does not qualify as a service, a conservation improvement program, or an on-bill repayment program as provided in statute."[115]

Even if the MPUC were found to have jurisdiction over this tariff filing, there are other prudent reasons why legislative sanction is necessary and desirable. Asking the Legislature for the requisite authority over TOB would remove any legal ambiguity and avoid possible future litigation. The Department urges the Commission to first "secure legislative authorization."[116] Commissioner Tuma shared this opinion when he noted, "[g]iven legal uncertainty and significant legal consequences for low-income folks, [we] really need legislature…authority."[117]

[114] See Office of the Attorney General, In the Matter of the Application by CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas for Authority to Increase Natural Gas Rates in Minnesota, Docket No. G-008/ GR-19-524, INITIAL BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL – RESIDENTIAL UTILITIES DIVISION (Oct. 7, 2020), at 6.

[115] Minnesota Department of Commerce, In the Matter of the Application by CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas for Authority to Increase Natural Gas Rates in Minnesota, Docket No. G-008/ GR-19-524, INITIAL BRIEF OF THE MINNESOTA DEPARTMENT OF COMMERCE, DIVISION OF ENERGY RESOURCES (Oct. 7, 2020), at 5. The Department has reiterated this position in its filing in this docket. *See* Minnesota Department of Commerce, Comments of the Minnesota Department of Commerce, Division of Energy Resources, Docket No. G008/M-21-377 (February 3, 2022), at 6 (concluding that "the Legislature likely needs to expressly authorize the TOBF pilot program").

[116] Minnesota Department of Commerce, INITIAL BRIEF, at 1.

[117] Commissioner Tuma, Statement (January 14th meeting).

CONCLUSION

TOBF is a well-intentioned idea, but is fraught with legal, programmatic, policy, and operational problems. These flaws are fatal and insurmountable. For all the reasons articulated above, the MPUC should:

1. Deny the Petition and prohibit implementation of TOB; and

2. Disapprove the tariff language, agreements, and other exhibits.

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