



Minnesota Solar Energy Industries Association

We Move Minnesota Solar + Storage Forward

April 14, 2023

Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55105

**Re: In the Matter of Xcel Energy's Petition for Approval of a Resiliency Service Program,
Docket No. E-002/M-22-170**

Mr. Seuffert,

Please find attached the answer required by Minn. R. 7829.3000 from the Minnesota Solar Energy Industries Association to the Petitions for Rehearing filed by All Energy Solar, Blue Horizon Energy and Sunnova Energy Corporation. This answer reflects the views of our organization and interested members related to whether the Minnesota Public Utilities Commission should reconsider its March 15, 2023, Order Approving Resiliency Service Program with Modifications and Requiring Annual Reports.

Sincerely,

/s/ Logan O'Grady, Esq.
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Enclosure: Answer of MnSEIA

**STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

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**In the Matter of Xcel Energy’s Petition for
Approval of a Resiliency Service Program**

**ANWER of the MINNESOTA
SOLAR ENERGY INDUSTRIES
ASSOCIATION (MnSEIA)**

April 11, 2023

Docket No. E-002/M-22-170

INTRODUCTION

The Minnesota Solar Energy Industries Association (“MnSEIA”) is a 501(c)(6) nonprofit trade association that represents our state’s solar and storage businesses, with over 145 member companies, which employ over 5,000 Minnesotans.

Monopolies are inherently detrimental to the public and the economy.¹ Monopolies eliminate customer choice, reducing the monopoly’s incentive to innovate and keep costs down. Which is why they are disfavored in a free-market democratic society.² The exception to that principle is

¹ See *In the Matter of a Petition of Northern States Power Company for Approval of a Public Charging Network, and Electric School Bus Pilot, and Program Modifications*, Department of Commerce, DIRECT TESTIMONY AND ATTACHMENTS OF MATHEW LANDI ON BEHALF OF THE DIVISION OF ENERGY RESOURCES OF THE MINNESOTA DEPARTMENT OF COMMERCE, Docket No. E002/CI-22-432, p. 110 (Feb. 7, 2023), (relying on expert opinion that allowing a for-profit electric utility into a competitive marketplace “risks that the private sector will face unfair competition from monopoly utilities”); and, Ohio Attorney General, <https://www.ohioattorneygeneral.gov/Media/Newsletters/Competition-Matters/October-2020/The-Effects-of-Monopolies-are-No-Laughing-Matter> (Oct. 26, 2020) (Noting that “with a monopoly, there can be little incentive for innovation or improvement on a product/service. Monopolies can also make it difficult for new and innovative companies to enter the market”).

² See Federal Trade Commission, *The Antitrust Laws* (noting that Congress passed a law in 1890 as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade” and noting that “for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”) <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

when the perceived benefits of a monopoly outweigh its inherent harm to society. Minnesota decided that the benefits of allowing monopolies to provide electric service outweigh the harm to the public that necessarily results from limiting the public's freedom to choose who provides that service.³ While the wisdom of that choice was likely clearer when that decision was originally made, the energy industry has changed dramatically in the last 10 years. And the Minnesota Public Utilities Commission ("Commission") is now routinely faced with deciding whether to allow electric utility's monopoly power to grow, thereby increasing the potential harm to society, or remain restricted to where it was originally granted-providing traditional electric service.

While maintaining traditional electric service is in the public interest now and for the foreseeable future, Minnesota's goal to have 100 percent clean energy by 2040 will require Minnesota to have a competitive marketplace for the development of distributed energy resources as well. Prior to the Commission's March 15, 2023, order, there was a competitive marketplace for resiliency services in Minnesota and there is nothing in the record to suggest that market demand could not be met by the current market participants. As such, MnSEIA supports the petitions that were filed to reconsider the Commission's order in this matter.

BACKGROUND

On April 7, 2022, Xcel Energy submitted an initial filing to create a Resiliency Service Program, that will provide back-up generation, solar photovoltaics, and battery energy storage system services for their commercial and industrial ("C&I") ratepayers with higher than standard service reliability needs.

MnSEIA, All Energy Solar ("AES") and Institute for Local Self-Reliance ("ILSR") opposed the program because of the inherent problems of allowing a monopoly to participate in a competitive market.

The Department of Commerce ("Commerce") supported Xcel's proposal for the following reasons:

- The program's costs are entirely contained to participating customers and will not impact non-participating customers.
- The program seeks to address a customer need but is entirely voluntary for participating customers.

³ See Minn. Stat. § 216B.37 (declaring that it is in the public interest to allow monopolies to provide electric service "in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public").

- The program is targeted at C&I customers who likely have the tools and experience to discern between different financing and leasing options in the market.
- All work related to the program will be done by third-party vendors, creating market opportunity for current and new participants.
- The size and scope of the program is limited to 15 projects over six years as proposed, allowing the Commission and stakeholders to assess the program without significantly decreasing market share of resiliency projects.
- Resiliency projects that include solar photovoltaic and storage assets may lead to greenhouse gas emission reductions during normal operations.
- The program may provide non-energy-related benefits to local communities by supporting critical infrastructure during extreme event.⁴

The hearing on this matter was held on February 2, 2023. At the hearing, MnSEIA raised its concerns regarding inherent problems caused by a monopoly participating in a competitive marketplace and inability of market participants to bring a complaint against Xcel when it engages in unfair or abusive practices. Accordingly, it asked for “a specifically stated dispute resolution process,” requesting that Minn. Stat. § 216.164, subd. 5 be used.⁵ Commissioner Sullivan responded, stating, “I did quickly check with staff and, our normal, if there is a problem, our normal complaint process is still open.”⁶

The Commission agreed with Commerce and approved the program on March 15, 2023, with the following conditions:

- a. All interconnection applications must be handled by a third-party vendor and must abide by all applicable Minnesota interconnection standards and all internal Xcel policies, including the Company’s technical planning standards and insurance requirements. In applying the applicable interconnection standards and policies, Xcel shall not treat participating and non-participating customers differently for interconnection purposes. If unexpected or unplanned Company incurred interconnection costs are required, the customer must pay and undergo studies as set forth in the Minnesota Distributed Energy Resources Interconnection Process (MN DIP). If distribution upgrades are required, the customer must pay them in accordance with MN DIP.

⁴ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, Public Utilities Commission, ORDER APPROVING RESILIENCY SERVICE PROGRAM WITH MODIFICATIONS AND REQUIRING ANNUAL REPORTS, Docket No. E-002/M-22-170, p. 4-5 (March 15, 2023).

⁵ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, Public Utilities Commission, HEARING, Docket No. E-002/M-22-170, at 40:20 - 40:31 (Feb. 2, 2023).

⁶ *Id.* at 46:53 – 46:59.

- b. Xcel may not use customer energy usage or grid data, that is not available to customers and third parties seeking to implement similar services outside of the resiliency services program, to market the program.
- c. Customers in the Resiliency Service Program shall only participate in tariffs for which they are eligible. Participation in the Resiliency Service Program alone does not make a customer eligible for participation in any tariffs or combination of tariffs that a similarly situated customer who is not in the Program would not be able to participate.⁷

The Commission also required annual reporting of certain information regarding the program.⁸

On April 4, 2023, AES filed a petition pursuant to Minn. R. 7829.3000 for rehearing, amendment, vacation, reconsideration, and/or reargument.⁹ After relating the experience of an electrician who experienced Xcel abusing its monopoly power by trying to steal a client from the electrician after his application was submitted to Xcel. AES noted that for developers, “there is zero benefit to pouring hours into a competitive bid to win business, only to have that business poached or derailed by the interconnecting utility.”¹⁰

Sunnova Energy Corporation (“Sunnova”), a nationwide provider of residential and commercial solar plus storage systems also filed a petition.¹¹ Sunnova noted that although “Xcel has committed to treating all interconnection applications equally, there are insufficient guardrails to ensure fair interconnection timelines and processes.”¹² It concluded noting that while it “supports the Commission’s efforts to improve resiliency and make renewable energy available to more Minnesota businesses,” it believed that “a robust, competitive market is the most effective way to protect rate payers and grow renewable deployment in the state.”¹³

A petition was also filed by Blue Horizon Energy (“BHE”).¹⁴ BHE stated that its concerns were straightforward.

First, it is impossible to compete with Xcel’s monopoly power. This leaves the Program ripe for Xcel’s anti-competitive abuse (even if unintentional). Second, the Program as-designed has no clear guardrails to address monopoly power

⁷ *Id.* at 6-7.

⁸ *Id.* at p. 7-8.

⁹ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, All Energy Solar, PETITION FOR RECONSIDERATION, Docket No. E-002/M-22-170 (April 4, 2023).

¹⁰ *Id.* at p. 2.

¹¹ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, Sunnova Energy Corporation, PETITION FOR RECONSIDERATION, Docket No. E-002/M-22-170, p. 1 (April 4, 2023).

¹² *Id.*

¹³ *Id.* at p. 2.

¹⁴ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, Blue Horizon Energy, PETITION FOR RECONSIDERATION, Docket No. E-002/M-22-170 (April 4, 2023).

concerns, no clear dispute resolution process to identify and resolve potential monopoly power abuses, and no process to define rules in either critical area. This creates no path for clear accountability to be defined and enforced upon Xcel. Third, the Program is, fundamentally, an unnecessary intrusion by a monopoly utility into the existing behind-the-meter market.¹⁵

It noted that “[t]his is a market which today is vibrantly competitive, with dozens of service providers and dozens more product offerings (in technical and financial terms) which can provide the same or better services as Xcel purports to propose.”¹⁶ It then went on to relay an experience it had that was similar to the one conveyed by AES. In 2022 it worked for several months on a multi-site solar and battery storage project with a school district in Northeast Iowa.¹⁷ Then, at the meeting to discuss interconnection, the utility pitched its own program and ultimately stole the customer.¹⁸ BHE then ¹⁹stated, “No matter how skilled a private developer may be, we cannot compete with a multibillion-dollar monopoly utility when they decide to steal our customers, and we are gravely concerned that Xcel’s market power will come to bear in a similar fashion here in Minnesota.” And concluded, “We have heard similar concerns from over a dozen other organizations, ranging from private developers to equipment distributors to contractors, who are deeply concerned about this issue. Many have chosen not to publicly petition for fear that their organizations will be retaliated against or their projects within Xcel’s territory will be jeopardized.”²⁰

ANSWER

MnSEIA supports the petitions filed by AES, BHE and Sunnova (“Petitioners”) for the following reasons.

1. Public Service Commission of Wisconsin Refuses to Extend Similar Program

The Public Service Commission of Wisconsin (“PSCW”) recently ruled on whether to modify and expand a pilot program called Solar Now, which is similar to Xcel’s Resiliency Program, into a regular program.²¹ The Solar Now program was “specifically designed for commercial and industrial customers who wish to host solar PV arrays on their property.”²² Those arrays are owned and operated by the utility will all the energy delivered to the distribution system.²³ The

¹⁵ *Id.* at p. 1-2

¹⁶ *Id.* at p. 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ See The Wisconsin Utility Regulation Report, PSCW Open Meeting Report for March 16, 2023, p. 5-7. (Included as Exhibit A)

²² *Id.* at p. 5.

²³ *Id.*

utility wanted to increase the participation cap from 35 to 60 MWs because the pilot program was nearly fully subscribed and it had approximately 20 customers on a waiting list.²⁴

The Chair of the PSCW noted that “with the proliferation of programs coming from the federal government under the IRA and the Bipartisan Infrastructure Law, *she got concerned when utilities use their monopoly position to gain an advantage in what should be the private marketplace.*”²⁵ Commissioner Huebner also noted his concerns about a monopoly’s “entrance into the competitive marketplace.”²⁶ Because of their concerns, Chair Valcq and Commission Huebner voted against expanding the pilot program into a regular program.

2. Department of Commerce Recognizes the Risk of Monopolies

While Commerce supported Xcel’s program in this docket, it has taken a different position in another docket where Xcel is also attempting to extend its monopoly power into a competitive marketplace. In docket 22-432, Xcel requested approval of a \$391.6 million electric vehicle (“EV”) program, which includes a public charging network, an electric school bus vehicle grid pilot, and program modifications for its existing EV pilots and rate offerings.²⁷

In filed testimony, Commerce identified the typical issues that one would expect when a monopoly is allowed to participate in a competitive marketplace. In response to the question regarding some of the potential outcomes, one of Commerce’s experts stated:

There is potential that Xcel’s proposal, if adopted, will deter other firms from setting up public charging stations in Minnesota. If one company can control more than 80% of the public charging market through a combination of vast number of charging ports and charging a price lower than market rate to most local customers it will not make financial sense for a potential entrant, especially a small firm to enter the market. Xcel stated that it did not conduct any analysis to study the impact its EV programs will have on the expected return on investment for non-utility firms to build EV charging infrastructure in Minnesota.²⁸

When asked if it was important for non-Xcel firms to build charging infrastructure in Minnesota, Commerce’s expert responded:

Absolutely. Even under Xcel’s 2030 Compliant Scenario, half of the projected public charging need in Xcel’s territory would be built by non-Xcel firms. Maintaining a market structure that would enable free entry of participants is crucial to meeting Minnesota’s EV target. Xcel’s current proposal may create

²⁴ *Id.* at p. 6.

²⁵ *Id.* at p. 6 (emphasis added).

²⁶ *Id.*

²⁷ *In the Matter of a Petition of Northern States Power Company for Approval of a Public Charging Network, and Electric School Bus Pilot, and Program Modifications*, Department of Commerce, NOTICE OF COMMENT PERIOD, Docket No. E002/CI-22-432, p. 110 (Aug. 22, 2022).

²⁸ *In the Matter of a Petition of Northern States Power Company for Approval of a Public Charging Network, and Electric School Bus Pilot, and Program Modifications*, Department of Commerce, DIRECT TESTIMONY AND ATTACHMENTS OF ADWAY DE ON BEHALF OF THE DIVISION OF ENERGY RESOURCES OF THE MINNESOTA DEPARTMENT OF COMMERCE, Docket No. E002/CI-22-432, p. 16 (Feb. 7, 2023).

significant entry barriers for potential market participants creating a perpetual need for Xcel to keep building more public chargers in the future.²⁹

To support his conclusion that “Xcel has not shown that the private sector will be unable to meet the public EV charging infrastructure needs in its service territory,”³⁰ Commerce’s other expert relied on a recently published law review article written by Professor Orford. Commerce quotes Professor Orford’s statement that:

[T]here are real risks to allowing for-profit electric utilities to step into the EV charging business: risks that utility ratepayers will be forced to pay for unnecessary, or unnecessarily costly, equipment; *risks that the private sector will face unfair competition from monopoly utilities*; risks that these burdens will fall hardest on those least able to bear the costs; and *risks that public utility commissions will favor utility interests over non-utility concerns*.³¹

Commerce’s expert also noted that in Colorado, the Colorado Public Utilities Commission (“CPUC”) initially approved a limited number of charging stations (20 – 25), but later limited that number to no more than five stations in areas that the market was not serving.³² The CPUC recognized that “the regulated monopoly and competitive market sit in a critical balance and in a rapidly evolving market like electric-vehicle charging service and related infrastructure, this balance is vulnerable.”³³

Similarly, the New Jersey Board of Public Utilities allowed utility ownership in very limited circumstances, known as “Last Resort” areas, while the Georgia Public Service Commission required the utility to file a plan wherein third-party developers are provided a “Right of First Refusal” to build a station within 15 miles of the utility-proposed location.³⁴ In short, numerous public utility commissions have recognized the inherent problems of allowing monopolies to participate in competitive marketplaces and significantly limited them.

If the Commission wants to maintain a competitive marketplace for resiliency services, Xcel cannot be allowed to participate in it without any limitations. While MnSEIA appreciates the safeguards the Commission placed on Xcel, those conditions miss are not sufficient to overcome the tremendous competitive advantage that a monopoly has in a marketplace. Its name alone is enough to make most customers choose it over any other company. As discussed by Commerce’s experts and the concerns raised by the Petitioners, Xcel’s participation in the market will deter other market participants, especially smaller ones, such that Xcel will become the only viable option. And while vendors will be doing the work, Xcel will control those vendors ability to participate in the market. Thus, the regulated monopoly will become the regulator for the resiliency services market.

²⁹ *Id.*

³⁰ Commerce, LANDI TESTIMONY, at p. 118.

³¹ *Id.* at p. 111 (emphasis added).

³² *Id.* at p. 113-114.

³³ *Id.* at p. 113.

³⁴ *Id.* at p. 112-113.

3. Xcel Already Abusing its Monopoly Power

Concerns about the abuse of monopoly power discussed by Commerce's experts are well-founded and the petitions highlight some real-world examples of such abuses. While comparing Xcel's Resiliency Program to its EV charging proposal may seem inapposite, there are, in fact, more similarities than differences. Most importantly, they are both competitive marketplaces where Xcel is seeking to become not only a participant, but the dominant market force. And, notably, Xcel appears to already be abusing its monopoly power in the EV charger market.

As explained by AES, after a local electrician spent the time and effort to acquire a customer to install EV chargers at a multi-family dwelling and submitted the necessary application to Xcel, he "suddenly found himself in competition with Xcel and working to keep the customer he had already contracted with. Xcel had used the customer data from the charger application to begin aggressively marketing their own program to a customer who had already selected their vendor of choice."³⁵

Based on Xcel's actions regarding its EV charging program, one would reasonably expect more situations just like the one experienced by BHE. It would be unreasonable to expect that a monopoly will not do whatever it can to eliminate any competition to maximize what it has a fiduciary obligation to do. As Commerce has recognized, "Electric IOUs have a fiduciary responsibility to their shareholders to maximize their profitability."³⁶

4. Commerce Position in this Docket is Inconsistent with Real-World Experiences and its Expert Position on Monopolies

There is a stark contrast between the position of Commerce in this docket and its position in docket 22-432. Commerce's experts in docket 22-432 clearly recognize the inherent problems of a monopoly participating in a competitive marketplace, while the comments in this docket demonstrate a lack of real-world experience and/or naïve optimism. It is hard to understand how concerns about monopoly power in one competitive market are not equally applicable to another competitive market, especially when Commerce's position in this docket appears to ignore those inherent concerns.

First and foremost, Commerce's position that the "risk of Xcel gaining a dominant market share through this Program is limited given that Xcel is anticipating implementation of 15 projects over six years across its Minnesota service territory," appears to ignore that the program is not limited so that there is nothing to stop Xcel from taking over the whole market. In light of the fact that there is no risk of loss because Xcel is rate basing the distributed generation assets and that it has a fiduciary obligation to maximize its investor's investment, there is no reasonable basis to expect that the program will not grow far beyond the 15 projects relied on by Commerce. Based on Commerce's expert opinions, the examples provided by the petitioners, and common

³⁵ AES, PETITION FOR RECONSIDERATION, p. 2-3.

³⁶ Commerce, LANDI TESTIMONY, p. 110-111.

sense, one would reasonably expect Xcel's program to not only exceed those 15 projects, but, rather, dominate the market, leaving no room for other companies.

Second, Commerce's belief that non-participant ratepayers will not be paying for the costs of the program is necessarily based on Commerce's oversight, its "eagle eye," of the complicated financials of the program during a rate case. While one would expect that such a task would already be difficult no matter how sharp one's vision for the overworked and under-resourced staff at Commerce, it becomes even more difficult when one considers the ease with which Xcel could hide program costs in typical ratepayer maintenance and upgrade costs. How will Commerce know if upgrades or maintenance costs that just happen to benefit a new project are properly attributed to ratepayers or the program participants? Commerce already has so many things to look out for in a rate case and the countless other filings of Xcel and other regulated entities that make it seem imprudent to add another one just to create a program that is unnecessary and threatens a competitive marketplace in Minnesota.

And while MnSEIA appreciates the Commission's effort to minimize Xcel's ability to abuse its monopoly power, one would reasonably expect any third-party vendor who handles the interconnection applications to have a natural preference for the company that is paying it to provide such services. Moreover, annual reporting will likely not be particularly useful in a rapidly moving competitive environment. By the time private companies receive it, the information will likely no longer be accurate enough to be of any use. And a lot of competitive advantage and market dominance can occur in a year. It's hard to put the proverbial horse back in the barn once it has left.

Fourth, stating that market opportunities will be created because all of the work related to the program will be done by third-party vendors is nonsensical. Xcel will control the market and dictate who participates in it. MnSEIA members will only be able to participate if Xcel allows them to participate. The entity that is supposed to be regulated, will, in fact, become the regulator of who provides resiliency services in Xcel's service territory. That is not creating a market, it is eliminating it. There was a market for these services that was functioning properly before Xcel was allowed to enter it.

Fifth, Commerce's opinion that Xcel's access to low-cost capital is not a competitive advantage because "Xcel has targeted this program at C&I customers with a need for higher-than-standard service reliability, which suggests that these customers are aware of their electric service needs and have the tools and expertise to assess different financing and leasing terms and rates," is belied by common sense and one of Xcel's reasons for the program. The resources of a multi-billion-dollar Fortune 500 company are always going to be an advantage. And Xcel said that it proposed the program because certain C&I customers had a higher-than-standard need for resiliency but were prevented from obtaining resiliency services because of "high upfront costs and the complexity of planning and building a resiliency project."³⁷ Thus, according to Xcel, it does not appear that these customers have the "tools and expertise to assess different financing and leasing terms and rates."

³⁷ PUC, MARCH 15 ORDER, p. 2.

Finally, the other reasons provided by Commerce are true whether a competitive market provides the resiliency services, or a monopoly does. So they necessarily cannot support the position that allowing a monopoly to participate in a competitive marketplace is in the public interest. Xcel's proposal is not adding anything that doesn't already exist in the marketplace while placing another burden on Commerce to monitor it to make sure that ratepayers are not abused, while at the same time threatening its competitiveness. It is hard to see how adding nothing while threatening everyone else's interests is in the public interest. It is surely in Xcel's interests, but Xcel's interests are not necessarily in the public interest.³⁸ In fact, there would appear to be an inherent conflict between Xcel's fiduciary obligation to maximize profitability for its investors, and the public's interest in having the freedom to choose the best services at a competitive price.

The simple reality is that if any customer is given the choice between receiving resiliency services from their current monopoly provider of electric service or a third-party competitor of that monopoly who will have to work with the monopoly to interconnect the project, the customer will almost always choose the monopoly until there is no other choice. Especially when that monopoly has significant financial resources, market buying power, access to low-cost capital and is known to make it difficult to interconnect any projects that are not its own.

5. Limit the Role of a Monopoly to Filling Gaps not Served by the Market

While a monopoly participation in any competitive marketplace has significant risks, the testimony of Commerce's experts in docket 22-432 provides several examples of how that participation can be done in a way that has less potential to harm the public interest. One way would be to limit monopoly projects to only those that are done as a "Last Resort," after third-party developers were provided an opportunity to develop the project.³⁹ Another approach would be a "First Right of Refusal, where Xcel would create a plan that allowed third-party developers a one-time 60-day right to claim a project that was identified in the plan."⁴⁰ Another could be to simply limit the total number of projects that Xcel could undertake. However, regardless of which approach is chosen, any program should be approved as a pilot program because any program that is not limited runs the risk of having unintended consequences that cannot be quickly or easily remedied.

6. Dispute Resolution Process for Anti-Competitive Behavior

At the hearing on this matter, MnSEIA noted its concerns about the lack of a dispute resolution process if Xcel were to engage in any unfair, abusive, or anti-competitive behavior. For example, if Xcel engaged in the type of behavior noted in the petitions, stealing a customer once the developer contacted the utility to discuss interconnection. At the hearing, Commissioner Sullivan stated that he had consulted with staff and confirmed that a dispute resolution process was available. The Commission's March 15 Order, however, does not identify the legal authority

³⁸ Commerce, LANDI TESTIMONY, p. 110 – 111 ("Electric IOUs have a fiduciary responsibility to their shareholders to maximize their profitability.").

³⁹ *Id.* at p. 112.

⁴⁰ *Id.* at p. 112-113.

for commencing a dispute if any such action is engaged in by Xcel. In its Answer, Commerce, likewise, states, “There are available avenues for raising concerns about Xcel’s administration of the Program or other actions by public utilities through current processes. Petitioners and others can file complaints with the Commission or contact the Department if Xcel is not adhering to the Commission’s requirements or with other concerns about anti-competitive behavior.”⁴¹

Commerce, however, like the Commission, fails to identify the legal authority or process for filing such a complaint. If the authority or process was so apparent, then it would presumably be easy to provide a citation to the legal authority for such a position. MnSEIA has not been able to identify any provision of Minnesota law that could be applicable.

The dispute resolution provision of Minn. Stat. § 216B.164, subd. 5, would be the most likely, but it does not appear applicable because it only applies to a dispute between a qualifying facility and a utility. If Xcel were to steal a customer from a developer, then the developer could not bring an action on behalf of a qualifying facility because it did not get to develop the project for the qualifying facility. It would be a dispute between a public utility and a company that wanted to develop a qualifying facility. Moreover, when Xcel exceeds the 15 projects it told Commerce it anticipates, one would reasonably expect that if any complaint was brought, Xcel would respond that it is not violating the Commission’s order because the order did not limit the program to just 15 projects. Accordingly, if the Commission decides not to amend its order in a way that limits the potential of Xcel to abuse its monopoly power, MnSEIA would request that the Commission either identify the legal authority to bring such a complaint or establish that a complaint can be brought under Minn. Stat. § 216B.164, subd. 5, if Xcel’s program exceeds 15 projects or otherwise engages in behavior that is detrimental to a competitive marketplace.

CONCLUSION

Maintaining competitive marketplaces is a core American value and it is hard to understand how an unnecessary program that destroys a competitive marketplace or even just reduces competition, could be considered to be in the public interest. It cannot be reasonably disputed that monopoly participation in a competitive marketplace creates such a risk. While monopolies are allowed in limited situations, their monopoly power must be carefully regulated because even without any improper motives,⁴² a monopoly cannot operate in a competitive marketplace without damaging it if left to operate unfettered. Like a bull in a China shop, a monopoly’s power hurts a competitive marketplace because of the actual and perceived influence that a monopoly has in it. Accordingly, unless it is restricted, it will inevitably lead to decreased competition, which will result in less innovation and higher costs. But that doesn’t mean that there is no place for a monopoly. As other public utility commissions have recognized, filling gaps in the marketplace is likely a reasonable way to allow monopolies to participate in a competitive marketplace. How that limited participation looks is likely something the

⁴¹ *In the Matter of Xcel Energy’s Petition for Approval of a Resiliency Service Program*, Department of Commerce, ANSWER TO RECONSIDERATION PETITIONS, Docket No. E-002/M-22-170, p. 4 (April 14, 2023).

⁴² As noted herein, IOUs have a fiduciary obligation to maximize their profitability.

Commission should evaluate after further consideration. Accordingly, while MnSEIA appreciates the Commission's efforts to limit Xcel's abusive monopoly power, MnSEIA does not believe they go nearly far enough to stop Xcel from taking over the resiliency services market. Without changes, Xcel will control the market and only the preferred vendors of Xcel will be able to get any work. Thus, MnSEIA agrees with Petitioners that the Commission should reconsider its March 15, 2023, order and amend it to limit Xcel's participation to a pilot program with either a limited number of projects or only projects that are not being met by the competitive marketplace. Further, pursuant to Minn. R. 7829.3000, subp. 6, MnSEIA recommends that the Commission stay its order pending action on the petitions.

Thank you for your time and consideration of this important issue that will directly affect Minnesota's ability to meet the clean energy goals that have been set for it.

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