

## Staff Briefing Papers

Meeting Date    Thursday, May 18, 2023    Agenda Item \*\*2

Company    Xcel Energy

Docket No.    E002/M-22-170

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

Issues    Should the Commission grant the petitions for reconsideration?

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**Relevant Documents**

**Date**

Order Approving Resiliency Service Program with Modifications and Requiring Annual Reports    March 15, 2023

Sunnova Energy – Petition for Reconsideration    April 4, 2023

Blue Horizon Energy – Petition for Reconsideration    April 4, 2023

All Energy Solar – Petition for Reconsideration    April 4, 2023

Department of Commerce – Answer to Reconsideration    April 14, 2023

Xcel Energy – Response to Petitions for Reconsideration    April 14, 2023

MNSEIA – Answer to Petitions    April 14, 2023

All Energy Solar – Reply to Petitions for Reconsideration    April 14, 2023

MNSEIA—Letter & Attachment to Letter    May 8, 2023

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

## **1. Statement of the Issues**

Should the Commission reconsider its decision in the March 15, 2023 *Order Approving [Xcel Energy's] Resiliency Service Program with Modifications and Requiring Annual Reports*, in the above-cited matter?

## **2. Background**

On March 15, 2023, the Commission issued its *Order Approving Resiliency Service Program with Modifications and Requiring Annual Reports*, in Docket No. E002/M-22-170. In this Order, the Commission approved an Xcel Energy resiliency service program to install back up generation and energy storage behind the meter for commercial and industrial customers. In the Order, the Commission included modifications and annual reporting.

On April 4, 2023, Blue Horizon Energy, Sunnova Energy, and All Energy Solar filed Petitions for Reconsiderations.

On April 14, 2023, All Energy Solar filed Reply Comments. On this date, Minnesota Solar Energy Industry Association (MNSEIA), Xcel Energy, and the Department of Commerce filed their individual Answers in response to the petitions.

On May 8, 2023 MNSEIA filed a Letter and attachment to the letter to supplement the discussion in this record. It is not summarized in this briefing paper.

Petitions for reconsideration are subject to Minn. Stat. §216B.27 and Minn. R. part 7829.3000.

Minn. Stat. §216B.27, subd. 1 provides that the Commission may grant a rehearing if it believes sufficient reason exists. Subd. 2 requires that the application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. Subd. 3 provides that if after rehearing it appears that the original decision, order, or determination is in any respect unlawful or unreasonable, the Commission may reverse, change, modify, or suspend the original action accordingly.

The standard the Commission has applied previously for reconsideration includes:

1. raises new issues,
2. points to new and relevant evidence,
3. exposes errors or ambiguities in the underlying order, or
4. otherwise persuades the Commission that it should rethink its previous order.

## **3. Petitions for Reconsideration**

### **A. All Energy Solar**

All Energy Solar (All Energy) requested the Commission either vacate its order and deny the Resiliency Services Program or modify the program to be a pilot instead. All Energy pointed to Xcel's EV Accelerate at Home program, which it stated was an example of Xcel's anti-competitive behavior in the EV sector. All Energy provided an example where an electrician that had contracted to install EV chargers at a multi-family unit was usurped by Xcel and its utility

run program, with the customer ultimately choosing Xcel's program. All Energy explained that the same situation could occur in the Resiliency Services Program if the Commission did not enact safeguards to protect against Xcel poaching customers from developers. All Energy believed the existing conditions the Commission placed on the program were insufficient to protect the private market from Xcel's monopoly power.<sup>1</sup>

All Energy requested the Commission reconsider its order and deny the program, or in the alternative, limit it to a pilot project until more information is known. All Energy also requested the Commission "create a legitimate forum for impacted developers to complain," stating that the current process is limited to qualifying facilities and not to projects that are in the interconnection application stage which Commission Staff believe to be referencing the dispute resolution language in Minn. Stat. §216B.164 as indicated by MNSEIA.<sup>2</sup>

### **B. Blue Horizon Energy**

Blue Horizon Energy, a developer of commercial and industrial solar and storage energy systems, stated that the Commission's approval of Xcel's Resiliency Services Program presents "the potential for irreconcilable abuse of monopoly power" due to its experiences in other jurisdictions.<sup>3</sup> Blue Horizon explained that the program lacked guardrails to curtail monopoly power, did not have a defined dispute resolution process, and lacked a process to define rules for either of the above problems. It also contended that the program is "an unnecessary intrusion by a monopoly utility into the existing behind the meter market."<sup>4</sup>

Blue Horizon explained that it had experienced anti-competitive behavior in a similar program in Iowa with Alliant Energy. Blue Horizon stated it had worked with a customer to develop a solar and storage project, but when it scheduled an interconnection meeting with the utility provider, Alliant Energy, the utility brought program staff for its own customer-sited solar program and lobbied Blue Horizon's customer to go with their program instead, with the customer ultimately choosing Alliant Energy. Blue Horizon explained it was concerned similar situations would happen in Minnesota with Xcel's program.<sup>5</sup>

Blue Horizon recommended the Commission vacate its Order and rescind approval of the program, however if the Commission decides to proceed with the Resiliency Services Program, Blue Horizon suggested implementing the following conditions:

1. The Program should be a limited pilot defined to a specific limited universe of Xcel customers, ideally the "dozen or so" they have identified previously in this docket.
2. Xcel should be prohibited from promoting or otherwise selling these services to any of its customers who are already engaged in discussions with private developers regarding solutions or projects similar to those provided by the Program.

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<sup>1</sup> All Energy Solar, Petition for Reconsideration, p. 2

<sup>2</sup> *Id.*, p. 3

<sup>3</sup> Blue Horizon Energy, Petition for Reconsideration, p. 1

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, p. 2

3. Xcel should be required to document a specific plan of controls and limitations that will ensure (a) no non-public customer or grid data is available to the Xcel teams selling or implementing the Program, (b) projects originated through the Program are not given any priority, whether through interconnection, engineering, or otherwise, above projects pursued by private developers outside of the Program, and (c) any other limitations developed through public comment in the rehearing process. This plan should be required to be submitted for public comment, PUC review, and PUC approval in this docket before the Program can be promoted to customers or implemented. This plan should then be annually reviewed, with the opportunity for public comment, so that future issues that arise may be addressed and the plan modified to avoid future conflicts.
4. Xcel should be required to document a specific dispute resolution process, such that if a private developer feels Xcel has violated the spirit of the Program or the limits placed upon it, that developer can have an efficient and effective means of preventing harm to their business as a result of Xcel's actions. This dispute resolution process should be conducted under the oversight of the Commission or another similar public agency.<sup>6</sup>

Blue Horizon explained it had heard from “over a dozen other organizations,” with many choosing not to join in the petition for reconsideration “for fear that their organizations will be retaliated against or their projects within Xcel’s territory will be jeopardized.”<sup>7</sup>

### C. Sunnova Energy

Sunnova contended that the Commission’s approval of Xcel’s Resiliency Services Program would put it at “a significant and permanent disadvantage, reducing competition and harming customers in Minnesota.”<sup>8</sup> Sunnova outlined three concerns with Xcel’s program. First, it was concerned that Xcel’s ability to rate base equipment would result in “spreading the largest portion of a project’s cost among all Xcel customers,” “divorcing that cost from the specific project” and give the Company “an insurmountable competitive advantage.”<sup>9</sup> Second, Sunnova contended that there were “insufficient guardrails to ensure fair interconnection timelines and processes” which would result in Xcel putting program applications ahead of other developers in the interconnection queue.<sup>10</sup> Finally, Sunnova believed Xcel would “demand access to all market segments” beyond the current scope of the program which focuses on commercial and industrial customers.<sup>11</sup>

## 4. Response to Petitions for Reconsideration

### A. Department of Commerce

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<sup>6</sup> *Id.*, pp. 2-3

<sup>7</sup> *Id.*, p. 3

<sup>8</sup> Sunnova, Petition for Reconsideration, p. 1

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, p. 2

The Department of Commerce filed a response recommending the Commission deny the reconsideration petitions. The Department explained the Commission already assessed and appropriately modified the Program to address the concerns raised by petitioners.

The Department noted that the Commission generally reconsiders decisions only when it finds there are new issues, new and relevant evidence to consider, errors or ambiguities in the prior order, or when the Commission is otherwise persuaded to rethink the decision.<sup>12</sup>

The Department argued that the Commission was and is well-aware of the concerns raised including:<sup>13</sup>

1. Program's scale,
2. Program's utility ownership structure,
3. potential for the utility to exercise unfair competitive advantages, and
4. need for monitoring of potentially anti-competitive behavior.

The Department stated the Program's scale is sufficiently limited, and the Commission's additional reporting requirements respect the needs of the public without being limited to a pilot. The Department also felt the structure of the program sufficiently differs from standard utility ownership in ways that mitigate concerns regarding anti-competitive behavior. Further the Department noted, the Commission took preventative action regarding anti-competitive use of utility data (Commission Order Point 1b). In response to concerns regarding complaint methods, the Department stated there are available methods to parties to report any alleged violation of Commission order or other concerns with Xcel's administration of the program.<sup>14</sup> For these reasons, the Department felt the concerns were assuaged.

The Department noted the Commission required Xcel to report annually on the number of new customers participating, the assets of each new customer, and the cost, allowing the Commission and parties to monitor scale and take mitigating steps if concerns arise.<sup>15</sup> This, along with the limited number of expected participants (approximately a dozen), assuaged their concern regarding Program scale and scope.

The Department pushed back against Sunnova's concern that Xcel will be able to rate base the cost of equipment and divorce the Program's costs from the Program's customers, stating again that all Program costs, including rate of return, are covered by the participating customers and that if a customer exits the Program early, they must pay for the full cost of the asset.<sup>16</sup>

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<sup>12</sup> In re Appl. Minn. Power for Auth. to Increase Rates for Elec. Serv. in Minn., E015/GR-16-666, ORDER GRANTING RECONSIDERATION IN PART, REVISING MARCH 12, 2018, ORDER, AND OTHERWISE DENYING RECONSIDERATION PETITIONS at 2 (May 29, 2018).

<sup>13</sup> Department of Commerce, Answer to Reconsideration, p. 2

<sup>14</sup> Staff believe the Department to be referencing resolution processes detailed under Minn. Stat. §216B.164, Minn. Stat. §216B.1611, and Minn. R. 7829.1500 - .1900

<sup>15</sup> Department of Commerce, Answer to Reconsideration, pp. 2-3

<sup>16</sup> DOC, Initial Comments, Attachment A

While there was understanding at the Commission<sup>17</sup> and at the Department regarding petitioners' concerns of unfair competitive advantages, the Commission specifically ordered that 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."<sup>18</sup>

While petitioners expressed concern regarding the complaint process, the Department did not believe a unique complaint resolution process is necessary for the program as there are available avenues for raising concern with the Commission and the Department if Xcel is not abiding by Commission requirements such as those outlines in the Commission's procedural rules under Minn. R. 7829.1500 - .1900.<sup>19</sup>

## B. Xcel Energy

After review of the Petitions, Xcel stated the Commission should not be persuaded to rethink the decision set forth in its order.

Xcel noted that the Order stated that the Commission was "satisfied that the Program, as modified... is structured to prevent unfair competitive advantages" and that the Company's "access to data gives the Company an unfair competitive advantage for identifying customers with high resiliency needs."<sup>20</sup> In consideration of the Petitioners' claims, the Commission prohibited the Company from using data that is not available to customers and third parties.

Xcel noted that the petitioners or other developers are free to develop projects with potential customers outside of the program; as well as participate as part of the program as a vendor. Xcel also noted that customers participating in the Company's program can choose a specific vendor for construction needs if the Program requirements are met.<sup>21</sup>

In response to Blue Horizon's example of a solar and battery storage project experiencing what Blue Horizon characterized as anti-competitive behavior in Iowa with Alliant Energy, Xcel stated these experiences are not relevant to how Xcel's program will be operated in Minnesota as the Company will not be using non-public customer information to market to potential program participants.<sup>22</sup>

In response to All Energy Solar concerns regarding anticompetitive behavior and their example of Xcel providing advisory services to a potential customer of the EV Accelerate at Home, Xcel noted this concern could and should have been raised in the initial and reply comment period for the instant docket as the example of concern occurred in 2021. Xcel also noted that advising a potential new participant in their EV programs regarding new options is not aggressive

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<sup>17</sup> Commission Order, p. 6

<sup>18</sup> Commission Order, p. 7, Order Point 1.b.

<sup>19</sup> DOC, Answer to Reconsideration, p. 4

<sup>20</sup> Commission Order, p. 6.

<sup>21</sup> Xcel, Response to Petitions for Reconsideration, p. 3

<sup>22</sup> *Ibid.*

marketing as claimed by the Petitioner but explicitly authorized by the Commission as fulfilling approved advisory services.<sup>23</sup>

In response to Sunnova concerns, Xcel reiterated that the Company will recover all costs and return on the assets from the participants through monthly charge and that no costs will be borne by non-participating customers.<sup>24</sup> Xcel also stated that this issue is clear and was considered by the Commission previously as discussed in the Commission Order.<sup>25</sup>

Xcel also responded to Sunnova's claim that the program provided the opportunity for the Company to prioritize program project interconnection over other developer projects. Xcel reiterated and pointed to Order Point 1a which requires interconnection applications for the project to be handled by third-party vendors and abide by all interconnection standards as well as the Order's statement that the Company cannot treat participating and non-participating customers differently for interconnection purposes.<sup>26</sup>

### C. MNSEIA

MNSEIA filed a response supporting the petitions to reconsider.

MNSEIA pointed out that the Wisconsin Public Service Commission (PSC) declined to extend a similar program, Solar Now, in March of 2023. The Chair of the Wisconsin PSC noted concerns about "utilities using their monopoly position to gain an advantage in what should be the private marketplace" and the Wisconsin PSC did not expand the pilot into a regular program.<sup>27</sup>

MNSEIA also noted the Department's position about utility intrusion into the private marketplace in the ongoing contested case in Xcel's Petition for Approval of a Public Charging Network, an Electric School Bus Pilot, and Program Modifications (Docket No. 22-432), expressing concern that the regulated monopoly could become the regulator for the resiliency services market.<sup>28</sup>

MNSEIA argued that while the perceived examples of abuse cited by Petitioners may seem non-applicable to resiliency services, MNSEIA stated they are both competitive marketplaces where Xcel seeks to become the dominant market force.

MNSEIA painted a contrast between the Department's positions on monopolies in Docket No. 22-432 and the instant docket, expressing confusion that the Department recognized an inherent problem with monopolies participating in a competitive marketplace related to EVs but not resiliency services. MNSEIA thought the Department ignored the fact the Resiliency Services Program is not limited to stop Xcel from taking over the market after their initial

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.*, p. 4

<sup>25</sup> Commission Order, pp. 2-3

<sup>26</sup> Xcel, Response to Petitions for Reconsideration, p. 4

<sup>27</sup> MNSEIA, Answer to Petitions, pp. 5-6

<sup>28</sup> *Id.*, p. 7

implementation of approximately 15 projects and stated Xcel is using rate base for the distribution generation assets of this program.<sup>29</sup>

MNSEIA contended the Department would not properly monitor the program or notice Xcel, whether purposefully or indirectly, hiding program costs by rolling them into typical ratepayer maintenance and upgrade costs during a rate case - noting during rate case proceedings parties can be stretched thin by the large amount of information under consideration. MNSEIA also questioned the neutrality of any third-party vendor processing an interconnection application of this program as they are being funded by Xcel.<sup>30</sup>

MNSEIA stated that C&I customers will virtually always choose the Company's services over other market players, even if the product being offered has the same or less benefit to the customer and the customer has perfect information. MNSEIA bases this on Xcel's access to low-cost capital and their resources as a multi-billion-dollar company.<sup>31</sup>

MNSEIA provided alternative examples of ways to limit monopoly projects by giving the Company the opportunity of last resort after third-party developers or first right of refusal where Xcel would allow third-party developers a one-time right to claim an identified project within a certain timeframe. MNSEIA also suggested limiting the total number of projects the Company could undertake before coming back to the Commission for potential approval of another tranche of projects.<sup>32</sup>

MNSEIA determined that because no citation was provided within the Order or within the Department of Commerce's Reconsideration Answers, they were unable to identify the process for filing a complaint. MNSEIA then pointed to the dispute resolution provision in Minn. Stat. §216B.164, subd. 5 which MNSEIA does not feel applies to this situation because MNSEIA determined it only applies to a dispute between a qualifying facility and a utility. MNSEIA asked the Commission to amend its order to limit the number of projects and if not, identify the legal authority to bring such a complaint or establish that a complaint can be brought under Minn. Stat. §216B.164, subd. 5.<sup>33</sup>

#### **D. All Energy Solar**

All Energy Solar submitted reply to the reconsideration petitions of Blue Horizon Energy and Sunnova Energy, agreeing with Petitions that the Commission should reconsider its Order and amend it to be a pilot program that limits the number of projects and establish a readily available dispute resolution process that allows aggrieved developers to seek redress.<sup>34</sup>

All Energy Solar noted it takes months to a year of investment of time and resources for a private developer to complete the process of customer acquisition and their belief that the

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<sup>29</sup> *Id.*, p. 8

<sup>30</sup> *Id.*, p. 9

<sup>31</sup> *Id.*, pp. 9-10

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, p. 11

<sup>34</sup> All Energy Solar, Reply to Petitions for Reconsideration, p. 2



Program will allow Xcel to unjustly benefit from the work expenses invested by developers. All Energy Solar stated the Order does not prevent Xcel from marketing the program to customers already in the interconnection queue.<sup>35</sup>

## 5. Staff Analysis

All three petitions raise similar concerns about Xcel's influence as a monopoly utility in a competitive market sector. The Commission considered similar arguments during its initial approval of the Resiliency Services Program.

Staff's assessment is that the petitions do not raise new issues, point to new and relevant evidence, or expose errors or ambiguities in the underlying order. If the Commission is persuaded by the petitions, it could reopen the proceeding to place additional limitations or protections on the program.

Staff notes that several parties raised concerns about Xcel using rate-base for equipment and recovering the costs from all customers. Staff wishes to clarify this point for docket participants: while Xcel does place the equipment into rate base, the cost recovery of the equipment is borne 100% by the participating customer and no costs are shifted to other rate payers. This is identical to Xcel's treatment of electric vehicles chargers in its Accelerate at Home programs. If Xcel did not place the equipment into rate base, it would be unable to offer customers financing of their projects which is a key component of the program.

Staff notes that in addition to the dispute resolution language in Minn. Stat. §216B.164 cited by MNSEIA the Minnesota Distributed Energy Resource (DER) Interconnection Process (MN DIP) established under Minn. Stat. §216B.1611 has language on dispute resolution (MN DIP 5.3) which applies to all interconnection applications under the MN DIP. The Commission's procedural rules under Minn. R. 7829.1500 - .1900 also outlines how informal and formal complaints may be raised. Parties can also participate in the docket and raise issues as they materialize or respond to Xcel's annual reporting.

## 6. Decision Options

1. Grant reconsideration of the March 15, 2023, Order.
2. Deny reconsideration of the March 15, 2023, Order.

*If the Commission grants reconsideration, take one or more of the following steps:*

3. Vacate the March 15, 20223 order and deny Xcel's Resiliency Service Program.  
(Sunnova; All Energy Solar and Blue Horizon Energy preferred)

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<sup>35</sup> *Id.*, pp. 2-3

4. Amend Xcel's program to limit it to the initial 5 to 6 projects identified in the Company's Petition. (All Energy Solar, Blue Horizon Energy)
5. Delegate authority to the Executive Secretary to establish a readily available Program dispute resolution process that allows aggrieved developers to seek redress. (All Energy Solar, Blue Horizon Energy)
6. Prohibit Xcel from promoting or otherwise selling Resiliency Services Program services to any of its customers who are already engaged in discussions with private developers regarding solutions or projects similar to those provided by the Program. (Blue Horizon Energy)
7. Require Xcel to document a specific plan of controls and limitations that will ensure:
  - a. no non-public customer or grid data is available to the Xcel teams selling or implementing the Program,
  - b. projects originated through the Program are not given any priority, whether through interconnection, engineering, or otherwise, above projects pursued by private developers outside of the Program, and
  - c. any other limitations developed through public comment in the rehearing process.

Require Xcel to file the plan [*within X days/by X date*] for public comment, PUC review, and PUC approval in this docket before the Program can be promoted to customers or implemented. (Blue Horizon Energy)

*If the Commission grants reconsideration, the following procedural option may also be selected:*

8. For procedural purposes only, grant reconsideration of the March 15, 2023, order for the limited purpose of tolling the 60-day time period to allow additional time for the preparation of the Commission's written order on the merits. (Staff)