

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Dates: November 5, 2015**Agenda Item #3

Company: Northern States Power Company d/b/a Xcel Energy

Docket No. **E-002/C-15-786**

In the Matter of a Formal Complaint and Petition by SunShare, LLC for Relief Under Minn. Stat. §216B.1641 and Sections 9 and 10 of Xcel Energy's Tariff Book

Issues:

- 1) Does the Commission have jurisdiction over the matter?
- 2) Are there reasonable grounds to investigate the allegation?
- 3) If the Commission chooses to investigate the complaint, what procedure should be used to do so?

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Relevant Documents

SunShare, Formal Complaint (public and trade secret) August 28, 2015
Commission, Notice of Comment Period September 1, 2015
Minnesota Solar Energy Industries Association, Comments September 10, 2015
Xcel Energy, Comments (public and trade secret)..... September 10, 2015
SunShare, Comments September 10, 2015
Fresh Energy, Comments September 10, 2015
DOC DER, Comments..... September 10, 2015
SunShare, Response to DOC Information Request #4.October 1, 2015
DOC DER, Comments and Attachments (public and trade secret).October 15, 2015
Xcel Energy, Reply Comments (public and trade secret).October 26, 2015

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Statement of the issues

- 1) Does the Commission have jurisdiction over the matter?
- 2) Are there reasonable grounds to investigate the allegation?
- 3) If the Commission chooses to investigate the complaint, what procedure should be used to do so?

Introduction and background

Since 2013, the Commission has been issuing Orders approving and modifying a Community Solar Garden program for Xcel Energy. Orders and other documents in that docket, E002/M-13-867, are available in eDockets and staff will not repeat them in detail here. However, Ordering Paragraph 2 in the Commission's August 6, 2015 Order in that docket may be of relevance:

2. *Xcel shall, as part of its monthly updates to the Commission in this docket,*
 - a. *identify each instance in which an application was deemed incomplete or otherwise returned to the applicant for additional information, the additional information being sought from the applicant, and the amount of additional time taken for processing the application; and*
 - b. *identify each instance in which the Company has not met a Section 10 tariff interconnection process timeline, or has otherwise restarted the timeline, and the reason for not meeting or restarting the timeline.*¹

In addition, page 11 of the Commission's April 7, 2014 Order in that docket may be relevant:

As recommended by the Department, the Commission will require Xcel to complete engineering studies and interconnection cost estimates for solar-garden applicants within the timeframes set forth in the Commission's September 28, 2004 order. If Xcel fails to meet these timeframes for a particular garden, the garden operator's deadline for achieving commercial operation will be extended on a day-for-day basis. These requirements will help ensure that solar gardens are able to interconnect expeditiously and that operators are not penalized for a delay caused by Xcel.

¹ August 6 Order, Community Solar Garden docket, page 29.

Relevant Statutes, Rules, and Orders

The Commission's formal complaint statute is Minn. Stat. §216B.17:

Subd. 1. On its own motion or upon a complaint made against any public utility, by the governing body of any political subdivision, by another public utility, by the department, or by any 50 consumers of the particular utility that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act, or omission affecting or relating to the production, transmission, delivery, or furnishing of natural gas or electricity or any service in connection therewith is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with notice, to make such investigation as it may deem necessary. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not in the public interest.

The Commission's formal complaint rules are found at Minn. Rules 7829.1700-1900 and govern procedure in the case of a formal complaint.

Minn. Stat. §216B.164:

Subd. 5. Dispute; resolution.

In the event of disputes between an electric utility and a qualifying facility, either party may request a determination of the issue by the commission. In any such determination, the burden of proof shall be on the utility. The commission in its order resolving each such dispute shall require payments to the prevailing party of the prevailing party's costs, disbursements, and reasonable attorneys' fees, except that the qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the commission finds that the claims of the qualifying facility in the dispute have been made in bad faith, or are a sham, or are frivolous.

Brief statement of allegations contained within Complaint

SunShare, a Community Solar Garden developer, alleges 103 violations of Xcel's Section 9 and 10 tariffs.²

In general, the violations alleged fall into the following categories: failure to timely deliver actionable scope-of-work statements under Section 10, Step 2; failure to timely complete engineering studies under Section 10, Step 4; failure to deliver completed engineering study results under Section 10, Step 5; and failure to provide actionable interconnection-cost estimates within the +/- 20 percent margin of error specified in NSP's own scope-of-work statements. The violations in the Complaint are largely organized by Site. The Exhibits are Trade Secret; the remainder of the Complaint is public.

In an Information Request response to the Department, SunShare stated that Xcel had deemed complete each of the 31 CSGs in Exhibit 3 of its complaint, delivered engineering study scope-of-work statements for 34 CSGs in Exhibit 2, and delivered a revised engineering study report for one CSG site in Exhibit 1, although not final.

Comments

The Department, Xcel, Fresh Energy, and MnSEIA filed comments. Staff provides only a very brief summary of the comments in the record.

Issue #1: Jurisdiction

Xcel stated that on its face, the Complaint does not mandate Commission action under Minn. Stat. §216B.17, which requires 50 customers to join the complaint. The Department agreed, since SunShare is not a customer but a third party vendor to Xcel Energy. However, Xcel and the Department agreed that the Commission has jurisdiction over the matter. Fresh Energy, MnSEIA, and Sunshare also agreed that the Commission has jurisdiction.

Issue #2: Whether There Are Reasonable Grounds to Investigate the Complaint

Nearly all commenters agreed there were reasonable grounds to investigate the complaint. Xcel, however, suggested that the public interest is best served by focusing on the building of solar gardens before the Investment Tax Credit (ITC) step down. The Commission, in Xcel's view, should conclude that resources and time should not be spent on a backward-looking investigation and review of the trajectory of individual applications.³

² Throughout its complaint, SunShare also uses the term "rules," which staff understands to mean tariff since the Commission has not promulgated any rules for the CSG program and because SunShare has not cited to any particular Commission rule that is being violated.

³ Xcel September 10 comments, p. 6.

Issue #3: If Investigated, What Procedure to Be Used by the Commission

Fresh Energy, SunShare, and MnSEIA all emphasized the importance of resolving these issues expeditiously. SunShare and MnSEIA also suggested financial penalties or other remedies.

In comments and supplemental comments, the Department provided a thorough review of the complaint. Staff refers the Commission to the Department's comments for its analysis. Ultimately, the Department recommended the following:

The Department recognizes that SunShare seeks a resolution to its complaint as quickly as possible. In laying out its recommendations, the Department believes there are three general areas to be resolved that can be pursued simultaneously: 1) resolution of disputed co-locations; 2) resolution of engineering and interconnection issues with the independent engineer⁴; and 3) areas in which the Commission may wish additional comment. The Department recommends the following:

With respect to co-location issues:

- *Require SunShare to identify the sites and applications for which it is disputing co-location, and identify the applications which it intends to withdraw in order to meet the 5-MW cap on co-located solar gardens.*

- *For disputed sites, Sunshare should provide the following information:*

- 1. A detailed explanation as to how each of the criteria set forth in the Commission's August 6, 2015 Order applies to each garden location;*
- 2. Detailed information on the ownership of each of the proposed gardens;*
- 3. Detailed information on who will manage each of the proposed gardens;*
- 4. Detailed information on who will operate and maintain each of the proposed gardens;*
- 5. If separate entities will be owning, managing, operating and maintaining the proposed gardens, please explain the entities' relationship to each other;*
- 6. Provide a map showing all common interconnection points and the geographic distance between each solar garden; and*
- 7. Provide the property tax identification number for the property on which each garden will be located.*

With respect to the provision of incomplete engineering studies and interconnection cost estimates:

- *Request that the parties provide a list of disputed interconnection and engineering study issues, an explanation of each party's position and all supporting documentation that will enable engineering review.*

⁴ Commission staff's understanding is that the independent engineer may be in place soon.

• *Direct parties to engage the use of an independent engineer as identified by the Department and urge the parties to address the issues expeditiously. With respect to Xcel's ability to interconnect solar gardens, the Department recommends that Xcel provide the following in reply comments:*

With respect to the interconnection of solar gardens once a signed interconnection agreement is in place, require Xcel to:

• *Identify how projects will be placed into the queue for interconnection completion, and how it will process the interconnection of solar gardens once a signed interconnection agreement is in place and the solar garden is constructed, including the personnel necessary to complete the interconnections in a timely manner,*

• *provide information on the nature of any-nonmaterial upgrades along with the timing and cost such upgrades scheduled for the substations at which SunShare is requesting interconnection, and*

• *outline how the Company will make its processes more transparent and responsive in the future, and the expected timelines for doing so.*⁵

Replies to the Department's recommendation

On October 26, Xcel filed reply comments to the Department's recommendation. Staff will not repeat the comments in detail here, but notes that Xcel provided some of the information the Department requested and identified a difference of opinion on tariff language. The disagreement on tariff language can be handled when Xcel's proposed CSG tariffs come to the Commission at a future agenda meeting.

Staff discussion

It is a struggle to identify the proper procedural treatment of this petition, which is the primary decision before the Commission today. Each party suggests a slightly different procedural path.

Complicating this procedural decision is the fact that in its original petition, SunShare cites to the Commission's formal complaint statute, Minn. Stat. §216B.17, but in its later comments, it cites to Minn. Stat. §216B.164 subd. 5.⁶ Those statutes also contemplate different procedural paths and the Commission has traditionally begun each type of petition differently; petitions filed as formal complaints under Minn. Stat. §216B.17 begin with a Notice from the Commission requesting comments on jurisdiction and procedure; petitions for dispute under Minn. Stat.

⁵ Department Supplemental October 15, 2015 comments, pp. 12-13.

⁶ Xcel did not offer any opinion on the applicability of Minn. Stat. §216B.164, subd. 5, which applies to disputes between a utility and a qualifying facility. If the Commission believes the record is not complete as to which statute applies, it could request that the parties comment on this matter in further proceedings.

§216B.164 subd. 5 proceed directly to a proceeding on the merits.⁷ Staff's analysis and the decision options staff has proposed are compatible with either statute.

Staff lists below the options available to the Commission in this docket.

Contested Case: few if any parties mention this as an option for SunShare's petition. However, a contested case would be the most appropriate fit under Minn. Rule 7829.1000, if the Commission chooses to move forward:

7829.1000 REFERRAL FOR CONTESTED CASE PROCEEDING.

If a proceeding involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings, unless:

A.

all parties waive their rights to contested case proceedings and instead request informal or expedited proceedings, and the commission finds that informal or expedited proceedings would be in the public interest; or

B.

a different procedural treatment is required by statute.

The SunShare complaint involves 103 alleged violations of tariff largely involving technical interconnection issues. This certainly involves contested material facts; in addition, the Commission can certainly find that all significant issues have not been resolved to its satisfaction.

The Department's supplemental comments illustrate why a contested case would be appropriate for resolving this dispute:

*In response, Xcel asserts for that for one of the Sites (Site A) [footnote omitted], SunShare requested a change to its project after the SOW was issued that necessitated additional information and study. For Sites B,C,D and E, Xcel asserts that it informed SunShare of missing technical engineering information as part of ongoing weekly meetings with SunShare. The Department is unclear whether the requested information was part of the SOW, or provided once the SOW had been accepted by SunShare.*⁸

⁷ See, for example, Docket E132/CG-15-255, where the Commission's first Notice requested comments on the merits of the dispute. See also E126/CG-10-1195, where the Commission's first Notice also directed the utility to file a response on the merits of the dispute.

⁸ Department Supplemental October 15, 2015 comments, page 5.

This single paragraph demonstrates that technical information is involved and that commenters such as the Department believe additional information is needed. A contested case proceeding would have the advantage of building a record through witness testimony to sort out these issues.

In addition, a contested case could be supported by SunShare, Fresh Energy's and MnSEIA's reference to Minn. Stat. §216B.164, subd. 5:

Subd. 5. Dispute; resolution.

In the event of disputes between an electric utility and a qualifying facility, either party may request a determination of the issue by the commission. In any such determination, the burden of proof shall be on the utility. The commission in its order resolving each such dispute shall require payments to the prevailing party of the prevailing party's costs, disbursements, and reasonable attorneys' fees, except that the qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the commission finds that the claims of the qualifying facility in the dispute have been made in bad faith, or are a sham, or are frivolous.

While the statute does not require a contested case proceeding, and other past disputes under this provision have not required a contested case, the reference to burden of proof and payment of attorneys' fees imply that a contested case is clearly an option.

Informal Proceedings Through Written Comments: This appears to be the recommendation of the Department and SunShare, and possibly MnSEIA and Fresh Energy.⁹ The Department has very thoughtfully assembled a list of additional information in its Supplemental Comments to further develop the record.

The Commission builds a record through written comments in many proceedings. Staff is concerned with the volume and granularity of issues in this particular complaint, and still believes they would be more appropriately developed in a contested case proceeding if the Commission wants to build a complete record. However, assuming that most parties are opposed to a contested case, staff sees a series of additional comments as a possible alternative, although one that could lead to a voluminous record. If the Commission pursues this option, staff would recommend not only adopting the Department's list of issues for further comment, but clarifying that the Executive Secretary can request other issues be developed in comments, for flexibility. In addition, it is common in formal complaint dockets for the Commission to give the parties time to negotiate prior to filing written comments; staff suggests that option here as well.

⁹ MnSEIA's comments at page 5 request an expedited proceeding under Minn. Rules part 7829.1900. Staff presumes MnSEIA means a proceeding in which written comments are the manner of building the record, on some shortened schedule. Fresh Energy makes some procedural recommendations at page 3 of its comments which staff interprets to mean written comments.

Mediation: Under Minn. Rules 1400.5950, the Commission may refer a matter to the Office of Administrative Hearings for mediation, and has done so in the past.¹⁰ Xcel also references dispute resolution as the process outlined in its tariff and SunShare acknowledges that Xcel's tariff has a 90 day mediation process.¹¹ One possible complication with this option is whether an OAH mediation process may overlap with work performed in the CSG stakeholder group. The Commission may want to ask parties at oral argument.

Ongoing Monitoring by the Commission and Department: This is the request SunShare makes in its complaint. Staff has not included this as a decision option because SunShare has not offered a proposal containing the level of precision needed for a decision option, which if adopted, would be incorporated as an Ordering Paragraph in the Commission's Order. Ongoing monitoring could mean anything from weekly meetings with the Department and Commission to some type of written updates on a regular basis, or some other mechanism staff has not thought of.

Assistance From Department Engineer: A number of parties reference the Department's commitment in the August 6th Commission Order to retain an engineer to increase the transparency of CSG application tracking. Staff welcomes the input of anyone with specialized expertise to provide a recommendation in this docket. Because Minn. Stat. §216B.164 subd. 5 states that either a utility or qualifying facility (QF) may request a determination of a disputed issue *by the Commission*, the Department's engineer would be making a recommendation to the Commission to assist it in its determination. This could be accomplished through a contested case process or through a less formal process such as written comments.

Dismissal Or Establishment of Other Procedures Prior to Record Development: Xcel suggests that under Minn. Stat. §216B.17 the Commission has discretion to dismiss the complaint or take actions other than devoting resources to the complaint. In other instances under this statute, the Commission has indeed dismissed complaints or established other procedures. In a 2011 docket, the Commission dismissed the complaint outright but directed the utility to work outside formal Commission process.¹² In response to a formal complaint filed by Suburban Rate Authority, the Commission directed Xcel to work with the SRA and other stakeholders on a potential solution

¹⁰ See, for example, ORDER GRANTING INTERVENTION AND REQUIRING MEDIATION AND BRIEFINGS, Docket No. P5096, 5542/C-09-265, Issued August 4, 2009. See also Docket P421/C-05-1209.

¹¹ Section 10, Sheet 85 of Xcel's tariff states: "In the event a dispute arises under this process, and if it cannot be resolved by the Parties within thirty (30) days after written notice of the dispute to the other Party, the Parties shall submit the dispute to mediation by a mutually acceptable mediator, in a mutually convenient location in the State of Minnesota. The Parties agree to participate in good faith in the mediation for a period of 90 days. If the parties are not successful in resolving their disputes through mediation, then the Parties may refer the dispute for resolution to the Minnesota Public Utilities Commission, which shall maintain continuing jurisdiction over this process." Section 9, Sheet 83 of the tariff similarly contains a 30 day written notice provision, but omits the 90 day mediation.

¹² ORDER DISMISSING COMPLAINT AND REQUIRING COOPERATION WITH CONSUMER AFFAIRS OFFICE, Docket No. E002/C-11-423, Issued September 12, 2011.

to the issues raised in SRA's complaint prior to requiring additional written comments.¹³ As mentioned previously, staff believes a possible compromise is to give SunShare and Xcel some period of time to discuss the issues raised in SunShare's complaint and then return to the Commission if their negotiations have not been successful.

Remedies: MnSEIA suggests that the Commission establish penalties. Staff appreciates feedback on possible program improvements, but believes this recommendation is outside the scope of the current docket, which is a complaint alleging past violations. Establishing penalties would be a forward-looking process. The Department provided some analysis on penalties; staff suggests MnSEIA and SunShare consult with the DOC and other parties on how best to propose penalties as part of the Community Solar Garden docket.

Decision Options

Jurisdiction

- 1) Find that the Commission has jurisdiction over the matters alleged in the Complaint; OR
- 2) Find that the Commission does not have jurisdiction over the matters alleged in the Complaint.

Whether There Are Reasonable Grounds to Investigate

- 3) Find that there are reasonable grounds to investigate the matters alleged in the complaint; OR
- 4) Find that there are not reasonable grounds to investigate the matters alleged in the complaint; OR
- 5) Make no finding on whether there are reasonable grounds to investigate the matters alleged in the complaint. Dismiss the complaint without prejudice for SunShare's failure to exhaust administrative remedies by not proceeding through the 90 day mediation process in Section 10 of Xcel's tariff.

Procedures Used to Govern the Investigation

- 6) Refer the matters raised in the complaint to the Office of Administrative Hearings for contested case proceedings. OR
- 7) Refer the matters raised in the complaint to the Office of Administrative Hearings for mediation pursuant to Minn. Rules part 1400.5950. OR

¹³ See the Commission's July 14, 2015 Order in Docket E002/M-12-383, ORDER FINDING JURISDICTION AND REQUIRING INVESTIGATION, where the Commission encouraged parties to enter into negotiations prior to filing written comments. See also Docket 12-1369, ORDER REQUIRING ANSWER TO COMPLAINT AND ESTABLISHING PROCEDURES, Issued June 10, 2013, directing negotiations for 45 days before requiring Xcel to file an Answer to the Complaint.

- 8) Delegate the authority to the Executive Secretary to issue a Notice establishing a schedule for written comments. The Notice shall include, but is not limited to, the issues raised in the Department's recommendation at pages 12-13 of its October 15, 2015 supplemental comments. OR
- 9) Delegate the authority to the Executive Secretary to issue a Notice establishing a schedule for Xcel and SunShare to discuss the allegations contained in the complaint. If the two parties do not reach agreement by the deadline established in the Notice, the Executive Secretary shall issue a second Notice establishing deadlines for written comments. The Notice shall include, but is not limited to, the issues raised in the Department's recommendation at pages 12-13 of its October 15, 2015 supplemental comments. The Executive Secretary retains the authority to extend deadlines through additional Notices, if necessary.
- 10) Direct Xcel to file an Answer to the Complaint as required by Minn. Rule 7829.1800, subpart 2. (*Staff note: in past dockets, answers have been required for complaints under Minn. Stat. §216B.17, but have not been required in the manner the rule requires them for disputes under Minn. Stat. §216B.164, subd. 5.*)