



Minnesota Solar Energy Industries Association
We Move Minnesota Solar + Storage Forward

April 10, 2023

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

Re: In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program, Docket E002/M-13-867

Mr. Seuffert,

Please find attached comments from the Minnesota Solar Energy Industries Association and the Coalition for Community Solar Access, collectively, referred to as the Joint Solar Associations. These comments reflect the views of our organizations and interested members related to whether the Minnesota Public Utilities Commission should approve the retroactive change to the applicable retail rate (“ARR”) calculation proposed by Xcel in its February 1, 2023, Compliance Filing for the 2023 ARR in Docket Number E002/M-13-867.

Sincerely,

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Enclosure: Reply Comments of the JSA

**STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

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

**In the Matter of Petition for Approval
of Northern States Power Company,
dba Xcel Energy, for Approval of its
Community Solar Garden Program**

**REPLY COMMENTS of the JOINT
SOLAR ASSOCIATIONS**

April 10, 2023

Docket Nos. E002/M--13-867

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 140 member companies, which employ over 4,500 Minnesotans.

The Coalition for Community Solar Access (“CCSA”) is a 501(c)(6) and is the national trade organization specifically focused on the community solar industry, representing over 110 member companies with active operations in over 20 states as well as at the Federal level.

Collectively, MnSEIA and CCSA offer these comments as the Joint Solar Associations (“JSA” or “Associations”).

Some of the Initial Comments filed in this docket raise important legal and factual issues, while others are more significant for what they do not say than what they do say. If the Minnesota Public Utilities Commission (“Commission”) wants to maintain a business environment that will allow the clean energy development necessary for Minnesota to meet the clean energy goals that have been set for the state, it will need to address those legal and factual issues. The legal issues are complex and include the legality of retroactively changing a rate established almost 10 years ago. The factual issues are equally complex, but would presumably only need to be addressed if the legal issues can be overcome. However, in the end, if any changes are made by the

Commission, then the Commission should ensure that its decision is fair, reasonable and in the public interest. To achieve such a result, the Commission should likely hold the party most responsible for the current situation accountable for it. In this matter, as previously noted, Xcel, is the party responsible for calculating the rate who had both the opportunity and obligation to raise this issue when the methodology was established. Thus, one would reasonably expect that Xcel bear responsibility for the current situation rather than more innocent parties. However, based on the record established to date, the JSA do not believe that it would be reasonable or lawful to retroactively change the calculation for the applicable retail rate (“ARR”) that was established by the Commission in 2014.¹ Rather, the Commission should approve the 2023 ARR calculated using the Commission approved methodology.

ADDITIONAL BACKGROUND

In response to the Commission’s Notice of Comment Period, numerous parties filed Initial Comments. None of the parties, except Fresh Energy, supported Xcel’s proposed retroactive change to the methodology for calculating the Applicable Retail Rate (“ARR”). Cooperative Energy Futures, Institute for Self-Reliance, Vote Solar, Novel Energy Solutions (collectively, “the CEF Group”, City of Saint Cloud, United States Solar Corporation (“US Solar”), CCSA, and MnSEIA all opposed Xcel’s proposal, while the Minnesota Department of Commerce (“Commerce”) did not want to take a position until Xcel provided more information.

The most compelling comments were provided by US Solar, which argued that retroactively changing the ARR violates both the executed community solar garden (“CSG”) contracts and the filed rate doctrine.”² US Solar noted that “the *Mobile-Sierra* doctrine, is ‘refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with the contractual obligations are invalid.’”³ And the filed rate doctrine “prevents a commission from revising retroactively a rate it had established previously. This restriction enables customers to ‘know in advance the consequences of the purchasing decisions they make.’”⁴ Thus, it “limits not only federal courts, state courts, and state commissions; it limits the rate-setting agency itself.”⁵ Which “means that the commission must respect its own rates.”⁶

¹ See Minn. Stat. § 216B.23, subd. 1 (every rate, toll, charge, or schedule shall be reasonable and lawful).

² *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, United States Solar Corporation, INITIAL COMMENTS, Docket No. E002/M-13-867, p. 4 (March 30, 2023).

³ *Id.* at 5, citing *Richmond Power and Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973).

⁴ *Id.* at p.4, citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1987).

⁵ *Id.*, citing Scott Hempling, *Regulating Public Utility Performance: The law of Market Structure, Pricing and Jurisdiction*, p. 312 (American Bar Association, 2013).

⁶ *Id.*

The City of St. Cloud stated that it “signed on as cornerstone subscribers to multiple solar gardens” and opposed any change in the ARR because that “would greatly impact the City of St. Cloud and its existing ARR subscribers.”⁷ Consistent with the comments of US Solar and, likely, all CSG subscribers, the City of St. Cloud became a CSG subscriber “with the expectation of a consistent ARR formula, which would continue as laid out when signing.”⁸

The CEF Group opposed Xcel’s proposal to retroactively change the ARR because its “approach to characterizing and quantifying the net costs of past CSGs is deeply flawed and dramatically overestimates the net costs of the program.”⁹ These parties noted that Xcel never defined at what point in time it was calculating the LMP price or how that correlated to the productivity of solar assets.¹⁰ But, more importantly, they recognized that:

The LMP price reflects the price to purchase bulk energy on the market, and does not reflect the infrastructure, capacity, or ongoing operating costs of various energy sources, all of which are borne by ratepayers. Community Solar Gardens have 100% of their cost to ratepayers passed through via the fuel clause, including the costs that support the construction of their generation capacity, any distribution (or transmission, though usually none are required) upgrades needed to connect that system to the grid, and the value that they provide to the grid in reducing peak load, reducing the need for future generating capacity, reducing the need for transmission capacity, environmental value, and other factors. This is not the case for many other energy sources ratepayers pay for, where substantial portions of the cost to ratepayers are hidden outside of the fuel clause and would not be included in an LMP market.¹¹

In short, “To say that the net cost to ratepayers of community solar is the portion of the bill credit that is above the LMP is to ignore a good two-thirds of the costs ratepayers pay for energy and thus the value a CSG can avoid.”¹²

⁷ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, City of St. Cloud, INITIAL COMMENTS, Docket No. E002/M-13-867, p. 1 (March 30, 2023).

⁸ *Id.*

⁹ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, Cooperative Energy Futures, Institute for Local Self-Reliance, Vote Solar and Novel Energy Solutions, INITIAL COMMENTS, Docket No. E002/M-13-867, p. 1 (March 30, 2023).

¹⁰ *Id.* at p. 2.

¹¹ *Id.*

¹² *Id.* at p. 3.

Considering the fact that Commerce is the state agency charged with enforcing the provision of Minnesota Statutes Chapter 216B,¹³ it is interesting that it does not start its analysis with an evaluation of the legal process and standards for changing a rate. So, without considering the legality of the proposed change, Commerce states that it may be reasonable, but that Xcel did not “provide the calculations it used to determine the above LMP market fuel costs with an accompanying explanation of the methodology supporting the calculations.”¹⁴

Fresh Energy is the only party that supported Xcel’s proposal and, not only did it do so without questioning the basis for Xcel’s calculations, it proposed additional changes as well.¹⁵ And though it states that it “does not encourage changes that would create contractual risk between community solar operators and subscribers,” it does just that without providing any legal analysis or legal authority to do so.¹⁶ It does accurately note that “the Commission determines what ‘applicable retail rate’ means as it was not defined in statute,” but appears to completely ignore that the Commission has already set the applicable retail rate and, thus, would need to follow the legal process and standard to change it.¹⁷

In summary, the parties that filed comments opposing Xcel’s proposal provided detailed legal or factual analysis for their position. The parties that filed comments that did not oppose Xcel’s proposal did not, which would suggest there is no legal or factual basis to do so. Thus, they should be considered more significant for what they do not say than what they do say.

REPLY COMMENTS

In response to the Initial Comments, the JSA provide the following Reply Comments. First and foremost, the Commission should not approve a retroactive change in the ARR because it would appear to violate the law, thereby impugning the integrity of Commission decisions and damaging the business environment in Minnesota. Second, if the Commission determines that the benefits of retroactively changing the ARR outweigh the risk of damaging its integrity and the business environment in Minnesota, its change should do so based on a detailed analysis of the costs and benefits of the electricity generated by CSGs. And finally, if the Commission decides a change is warranted, the change should impose the costs of the change on the party most responsible for the current situation, Xcel, not innocent parties.

¹³ See Minn. Stat. 216A.07, subd. 2 (“The commissioner is responsible for the enforcement of chapters 216A, 216B and 237 and the orders of the commission issued pursuant to those chapters.”).

¹⁴ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, Department of Commerce, INITIAL COMMENTS, Docket No. E002/M-13-867, p. 5 (March 30, 2023).

¹⁵ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, Fresh Energy, INITIAL COMMENTS, Docket No. E002/M-13-867 (March 30, 2023).

¹⁶ See *id.* at p. 4.

¹⁷ See *id.*

1. A Retroactive Change of the ARR violates the Law

As the JSA noted in their Initial Comments, the JSA believe that the initial question should be whether it is reasonable to retroactively change the Commission approved ARR formula and thereby amend all executed instances of the ARR Standard Contract. Clearly, whether something is reasonable necessarily includes whether it is legal. Whether it is legal would include analyzing the legal arguments raised by US Solar. In addition to the legal arguments made by US Solar, as noted in the JSA's Initial Comments, Minnesota law prohibits retroactive legislation.¹⁸ As the Minnesota Supreme Court has recognized, that prohibition has been incorporated into Chapter 216B. In *Peoples National Gas Co. v Minnesota Public Utilities Commission*, the Minnesota Supreme Court stated:

Ratemaking is a quasi-legislative function, *see St. Paul Chamber of Commerce v. Minnesota Public Service Comm'n*, 312 Minn. 250, 262, 251 N.W.2d 350, 358 (1977), and legislation operates prospectively. Indeed, the Public Utility Act expressly prohibits retroactive ratemaking. Minn. Stat. § 216B.23, subd. 1 (1984), provides: “[T]he commission shall * * * by order fix reasonable rates * * * *to be imposed, observed and followed in the future.*” (Emphasis added.) *See also* Minn. Stat. § 216B.16, subd. 5 (1980) (“If, after the hearing, the Commission finds the rates to be unjust or unreasonable or discriminatory, the commission shall determine the level of rates to be charged or applied by the utility * * * and the rates are thereafter to be observed * * *.”), and the present version of that statute, as amended by 1982 Minn. Laws, ch. 414, § 5, (“Rate design changes shall be prospective * * *.”).¹⁹

In this situation, the ARR formula was established in 2014, and, as noted by the City of St. Cloud, subscribers reasonably expected that the rate formula approved by the Commission nine years ago would not be changed during the 25-year term of the subscriber contract that they signed. While the ARR amount would change each year based on what Xcel was charging its customers, the formula would not. Thus, any change to the rate formula will necessarily have a retroactive effect.²⁰

To think of this in a similar context, imagine the position that an independent power producer or Xcel would have if the Commission was considering changing the terms of a Power Purchase Agreement years after it was signed based on an issue that was either accidentally or intentionally not addressed when it was signed. Surely, neither Xcel nor the independent power producer would think that such a change is appropriate without their consent. If retroactively

¹⁸ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, The Joint Solar Associations, INITIAL COMMENTS, Docket No. E002/M-13-867, p. 6 (March 30, 2023).

¹⁹ *Peoples Natural Gas Co. v. Minn. Pub. Utilities Comm'n*, 369 N.W.2d 530, 533 (Minn. 1985).

²⁰ *See* Minn. Stat. § 216B.02, subd. 5 (“‘Rate’ means every compensation, charge, fare, toll, tariff, rental, and classification, or any of them, demanded, observed, charged, or collected by any public utility for any service and any rules, practices, or contracts affecting any such compensation, charge, fare, toll, rental, tariff, or classification.”).

changing a PPA is not legal or reasonable, then it's hard to understand how changing retroactively (and unilaterally) executed instances of the ARR Standard Contract, which is effectively a CSG PPA, could be legal or reasonable.

Moreover, even if such a change was not prohibited by the law, all parties would also reasonably expect that the Commission and Commerce would require that Xcel follow the process established by Minnesota law for proposing a rate change. Minn. Stat. 216B.16, subd. 1, requires that any notice to the Commission regarding a proposed change to any rate “duly established under this chapter,” “shall include statements of facts, expert opinions, substantiating documents, and exhibits, supporting the change requested, and state the change proposed to be made in the rates then in force and the time when the modified rates will go into effect.” As recognized by Commerce and others, Xcel did not provide any explanation for the basis of its calculations, much less “expert opinions, substantiating documents, and exhibits” supporting its proposed retroactive change to the ARR.²¹

In addition, Minnesota law also requires that “[t]he filing utility shall give written notice, as approved by the commission, of the proposed change to the governing body of each municipality and county in the area affected. All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon schedules on file and in force at the time.”²² Based on a review of the docket, it does not appear that “each municipality and county in the area affected” was given notice. And, based on the City of St. Cloud’s comments, cities, their taxpayers and their ratepayers clearly have an interest in a such a retroactive change. Surely, other cities and counties affected by this change would have an opinion, likely a strong one, if Xcel had provided them with actual notice of its proposed changes to the ARR formula.

In summary, US Solar and the JSA raised several important legal considerations in their Initial Comments. Because it is the responsibility of the Commission to ensure compliance with Chapter 216B, it should probably do so before considering the reasonableness of Xcel’s proposal.

2. Xcel’s Approach is “Deeply Flawed and Dramatically Overestimates the Net Costs” of the CSG Program.

As previously mentioned in the JSA’s Initial Comments, the basis for Xcel’s request is that “the ARR compensation formula includes the above locational marginal price (“LMP”) market fuel costs imposed on the system.”²³ Even if Xcel’s proposal to retroactively change the ARR did not violate the legal process or standards, it “deeply flawed and dramatically overestimates the net costs” of the CSG program. As explained by the CEF group, “The LMP price reflects the price

²¹ Minn. Stat. § 216B.16, subd. 1.

²² *Id.*

²³ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, Xcel Energy, UTILITY COMMENTS, Docket No. E002/M-13-867, p. 1 (March 30, 2023).

to purchase bulk energy on the market, and does not reflect the infrastructure, capacity, or ongoing operating costs of various energy sources, all of which are borne by ratepayers.” It also does not reflect Xcel’s guaranteed rate of return.²⁴ As explained in Exhibit A, an analysis by the Institute for Local Self-Reliance,

The CEF Group proposes that if the Commission is going to retroactively change the ARR, it should more accurately calculate any potential above market costs of the CSG program. The CEF Group outlines all of the net costs that must be considered, and the difficulty in making such calculations. Thus, it recommends that the Commission consider a calculation that is already established that more accurately determines the value of the energy produced by a CSG, the Value of Solar (“VOS”).²⁵ While the JSA question whether such a retroactive rate change should be made for the reasons discussed above and in US Solar’s Initial Comments, if the Commission believes that a change was warranted, the JSA agree that the VOS is a more accurate yard stick to use than the LMP.

As the JSA noted in their Initial Comments, the VOS rate cannot fairly be argued to impose any unreasonable costs on non-participating ratepayers.²⁶ Commerce noted in the study establishing the VOS methodology:

While NEM effectively values PV-generated electricity at the customer retail rate, a VOS tariff seeks to quantify the value of distributed PV electricity. If the VOS is set correctly, it will account for the real value of the PV-generated electricity, and the utility and its ratepayers would be indifferent to whether the electricity is supplied from customer-owned PV or from comparable conventional means. Thus, a VOS tariff eliminates the NEM cross-subsidization concerns.²⁷

Further, the Commission has already determined that the VOS is value the CSG’s energy provides to Xcel’s system, stating, “Because the value-of-solar rate compensates subscribers for the value—and only the value—that their generation brings to Xcel’s system, it will address concerns that nonparticipating ratepayers are subsidizing the program.”²⁸

So, while the JSA do not believe that retroactively changing the ARR is allowed by the law or consistent with the process established by the law, if the Commission disagrees, then it should do a detailed analysis consistent with the Initial Comments of the CEF Group, supported by “expert opinions, substantiating documents, and exhibits, supporting the change requested change.”

²⁴ See Minn. Stat. § 216B.16, subd. 6.

²⁵ CEF Group, INITIAL COMMENTS, p. 3-4.

²⁶ The JSA, INITIAL COMMENTS, p. 5-6.

²⁷ Minnesota Department of Commerce, Division of Energy Resources, Minnesota Value of Solar: Methodology, p. 1 (April 1, 2014).

²⁸ *In the Matter of Petition for Approval of Northern States Power Company, dba Xcel Energy, for Approval of its Community Solar Garden Program*, ORDER REJECTING XCEL’S SOLAR-GARDEN TARIFF FILING AND REQUIRING THE COMPANY TO FILE A REVISED SOLAR-GARDEN PLAN, Docket No. E002/M-13-867, p. 14 (April 7, 2014) (“April 2014 PUC CSG Order”).

3. Xcel Investors Should Pay for Xcel's Negligent or Intentional Action.

To retroactively change the ARR will cause harm to innocent ratepayers, either the CSG subscribers or perhaps nonparticipating ratepayers. Xcel is a sophisticated Fortune 500 company with substantial resources. As previously discussed, it could have and should have been brought up this issue nine years ago when the ARR was established. However, instead of providing a reasonable formula for the ARR that raised the alleged compounding effect that would result from the formula proposed by other parties, Xcel argued that “the existing average retail utility energy rate” should be used “because that rate appeared to provide the fastest path to approval.”²⁹ Thus, it would appear that Xcel is responsible for the current situation.

Therefore, if the ARR is retroactively changed, then perhaps the only way to avoid innocent parties from being harmed by Xcel's failure to raise this issue previously is to keep the ARR as it is but require Xcel's investors to pay for any excessive costs of the CSG program as determined by the Commission. It is both fair and reasonable for the party responsible for the situation to bear the consequences of it. Xcel should be held responsible for its actions, not innocent subscribers or other ratepayers.

CONCLUSION

Whether or not parties would agree today that the ARR should be established in a way that does not result in any sort of compounding effect over time, the fact remains that the rate established by the Commission almost 10 years ago did not account for that. Xcel, the party responsible for doing the ARR calculation, could have and should have raised the issue at the time (or through a timely Motion for Reconsideration) if it wanted it to be addressed by the Commission. It did not and CSG ratepayers/subscribers should not be prejudiced by Xcel's intentional or negligent actions. Thus, while the JSA do not believe that a retroactive change to the ARR or unilateral modifications to executed ARR contracts is legal, especially considering the rate change process was not followed, if the Commission believes that a change is legally allowed, fair, reasonable and in the public interest, the change should not harm innocent parties. To rule otherwise would benefit the party who caused the harm, to the detriment of everyone else. This could likely damage the integrity of the Commission's decisions and the business environment in Minnesota. If Minnesota wants to achieve 100 percent clean energy by 2040, clean energy developers must be confident that Minnesota provides a fair and certain business environment for developing renewable energy projects. Retroactively changing contracts nine years after they were signed because of the intentional or negligent acts of a party to those contracts will not provide that kind of business environment. If it is legal to change a CSG contract today, one would reasonably expect it could be legal to change a PPA or other energy contract in the future. Thus, the Commission should either not allow a retroactive change to the ARR or hold the party responsible for the situation caused by its intentional or negligent acts.

²⁹ *Id.*

Thank you for your time and consideration of this important issue.

Sincerely,

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