CASE NO. A24-0845

STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Solar Energy Industries Association,

Relator,

vs.

Minnesota Public Utilities Commission,

Respondent.

RELATOR'S REPLY BRIEF

Curtis P. Zaun (#0266310)
MnSEIA
445 Minnesota Street
Suite 730
St. Paul, MN 55101
Telephone: (651) 677-1602
czaun@mnseia.org

Attorney for Relator

Susan Gretz (#0209235)
Jeffrey K. Boman (#0396253)
Minnesota Attorney General's Office
445 Minnesota Street
Suite 1400
St. Paul, MN 55101
Telephone: (651) 300-7152
susan.gretz@ag.state.mn.us
jeffrey.boman@ag.state.mn.us

Attorneys for Respondent Minnesota Public Utilities Commission

Eric F. Swanson (#0188128)
Kyle R. Kroll (#0398433)
Steven E. Vogel (#050591)
Winthrop & Weinstine, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
Telephone: (612) 604-6400

-and-

James R. Denniston (#0390949)
Xcel Energy
414 Nicollet Mall, 401-8
Minneapolis, MN 55401
Telephone: (612) 215-4656

Attorneys for Respondent Xcel Energy

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SUMMARY OF THE REPLY ARGUMENT

This appeal is about when the Minnesota Public Utilities Commission ("Commission") has the responsibility to regulate public utilities. The Minnesota Legislature declared it "to be in the public interest that public utilities be regulated"[1] and it is now up to this Court to determine whether Minnesota law and the public interest require the exercise of that regulatory responsibility with regard a generic rule/policy/practice/standard as significant as Xcel's Technical Planning Limit ("TPL"),[2] which limits the capacity of Xcel's distribution system by an amount greater than all of the solar capacity currently installed in Minnesota.[3] While Relator does not expect every interconnection decision of a public utility to be reviewed by the Commission, a generic rule/policy/practice/standard as significant as the TPL, arguably the most significant interconnection rule/policy/practice/standard that Xcel is enforcing, should meet any reasonable threshold for the Commission to be required to exercise its regulatory responsibilities. Regulatory responsibilities that requires the Commission to actually

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[1] *See* Minn. Stat. § 216B.01.

[2] Xcel now refers to its TPL as its Technical Planning Standard ("TPS"). Because the TPL has been used in numerous early filings and more accurately describes what it does, which is likely why Xcel renamed it, Relator will continue to refer to it as the TPL.

[3] *See* FORMAL COMPLAINT AGAINST XCEL ENERGY REGARDING THE ILLEGAL INTERCONNECTION RULE/PRACTICE THAT LIMITS THE CAPACITY OF ITS ENTIRE DISTRIBUTION SYSTEM, p. 3 (Sept. 12, 2023) (Record 000004), *citing*, IREC, MN Interconnection Ruling Contains Some Wins and a Major Threat (Aug. 8, 2022) (available at: https://irecusa.org/blog/irec-news/mn-interconnection-ruling-contains-some-wins-and-a-major-threat/) (visited Sept. 9, 2023), wherein IREC estimates that Xcel's TPL eliminates 2 to 3 gigawatts of capacity that could be used to install distributed energy resources, while the total capacity of interconnected solar according to Xcel was 1.127 gigawatts in 2022. *See* Response Brief of Xcel Energy, p. 10.

determine whether this rule/policy/practice/standard is consistent with Minnesota law, reasonable and in the public interest, rather than simply asking the public utility that is accused of violating Minnesota law and harming the public interest to conduct a meeting, without any particular requirements, to try to justify its actions to a public that has already voiced its opposition to the monopoly's actions and asked for further investigation. Such self-regulation would seem to be a far cry from the type of regulation that the Minnesota Legislature and the public would expect. But if, as Respondents argue, the Commission's regulatory obligations are permissive rather than mandatory, even when such a significant and important matter is at issue, then the burden returns to the Minnesota Legislature to determine whether this type of permissive regulation is in the public interest and will move Minnesota toward a democratic clean energy economy where all of its citizens are able to participate in a way that the Legislature appears to envision.

As noted in the Initial Brief, the threshold issue in this matter is a legal one, about whether the Commission must approve a generic interconnection rule/policy/practice/standard as significant as the TPL before it can be implemented by a public utility. Because this is a legal question, this Court is not required to defer to the Commission's decision, or, more accurately, lack of decision, in this matter. And, if the Court agrees that Minnesota law requires the Commission to approve a generic rule/policy/practice/standard like the TPL before it can be implemented, then the

Commission erred as a matter of law[4] in allowing Xcel to continue to enforce it because there is no dispute that the Commission has not approved the TPL.

If the Court determines that the Commission is not required to regulate public utilities, then this Court must determine whether the Commission's determination that there were not reasonable grounds to investigate the allegations in the complaint is supported by substantial evidence, consistent with the law, and not arbitrary and capricious. Respondents argue that Xcel used its "engineering judgment" to determine that the TPL was necessary to safely and reliably manage its distribution system, despite Xcel admitting at the hearing on this matter it was a policy decision that was not based on any detailed analysis.[5] So, despite the fact that Xcel's TPL limits the capacity of its entire distribution system by an amount greater than all of the solar resources currently installed in Minnesota, which necessarily harms the public by limiting the ability of ratepayers to interconnect their system and increases the cost to do so, Respondents argue that there is no reasonable grounds to investigate the allegations in the complaint. The Minnesota Department of Commerce, Minnesota Attorney General's Office, and every other party who filed timely comments disagreed, generally recognizing the importance of the Commission exercising its regulatory responsibilities.[6] As the Minnesota Attorney General's Office stated:

> Thus, at the heart of this debate is the question of whether Xcel did or did not have independent authority to implement the revised TPL. Resolution of this question, which essentially asks the Commission to clarify the boundaries

[4] *See* Minn. Stat. § 14.65 (court may reverse an administrative inference, conclusion or decision if it is affected by an error of law).
[5] *See* December 2023 Hearing Transcript, p. 21, lines 2, to p. 24, line 5.
[6] *See* Staff Briefing Papers, p. 6-7 (Record 000445-000446).

> between the independent engineering judgment utilities are allowed and encouraged to exercise, and generic rules and interconnection policies which require Commission approval, may go a great distance to create predictability and prevent future complaints by ensuring that utility action in this realm remains within well-defined authority. Thus, resolution of this question creates reasonable grounds for the Commission to investigate MSA's allegations.[7]

ARGUMENT

Legal Determinations are Reviewed De Novo without any Deference to the Agency.

The Commission's determination that a public utility can implement a generic rule/policy/practice/standard without its approval is legal question that is not entitled to any deference. The Minnesota Supreme Court has made it clear that "[s]tatutory interpretation is a question of law that we review de novo."[8] More recently, the Minnesota Supreme Court has stated,

> We review de novo an agency decision that turns on the meaning of words in a statute or regulation. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise. Thus, we may substitute our own judgment for that of the agency when the language at issue is clear and capable of understanding.[9]

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[7] *In the Matter of the Formal Complaint and Request for Relief by the Minnesota Solar Advocates against Northern States Power Company dba Xcel Energy*, Dkt. No. E-002/C-23-424, COMMENTS, p. 5 (Minn. Atty. Gen. Oct. 20, 2023) (citations omitted) (Record 000282).

[8] *J.D. Donovan, Inc. v. Minn. Dep't of Transp*., 878 N.W.2d 1, 4 (Minn. 2016).

[9] *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 757 (Minn. 2021) (quotation and alteration omitted), *reh'g denied* (June 15, 2021).

Thus, whether Minnesota law requires the Commission to approve a rule/practice/policy/standard like the TPL is something this Court determines de novo, without any deference to the Commission's decision.

Minnesota Law Requires the Commission to Regulate Public Utilities.

As previously noted, Minn. Stat. § 216B.05, requires that public utilities file with the Commission "all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it" and all rules that, "in any manner affect the service or product, or the rates charged or to be charged for any service or product." Minn. Stat § 216B.02, subd. 5, broadly defines rate to include any rules or practices affecting any compensation, charge, fare, toll, rental, tariff, or classification. There is no dispute that Xcel has not filed the TPL with the Commission as required by Minn. Stat. § 216B.05.

Minn. Stat. § 216B.03 requires that every rate made, demanded, or received by any public utility to "be just and reasonable." There is not dispute that the Commission has never determined that the TPL is just and reasonable.

And, Minn. Stat. § 216B.1611 required the Commission to initiate a proceeding "to establish, by order, generic standards for utility tariffs for the interconnection and parallel operation of distributed generation." The Commission adopted generic interconnection standards for the interconnection and parallel operation of distributed generation[10] and then

[10] The Minnesota Distributed Energy Resources Interconnection Process ("MN DIP"), which is the Commission established process for connecting distributed energy resources,

Xcel fundamentally changed the rule/policy/policy/practice regarding the interconnection of distributed generation with the TPL.

Pursuant to Minn. Stat. § 216B.16, Xcel cannot legally change a rate without the approval of the Commission. Notably, "The burden of proof to show that the rate change is just and reasonable shall be upon the public utility seeking the change."[11] The notice of rate change must "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."[12] There is no dispute that Xcel has not provided the notice required by Minnesota law. There is also no dispute that the Commission has not approved the TPL.[13] Thus, regardless of whether this Court believes the TPL is just and reasonable, because Xcel has not complied

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such as solar energy generating systems and batteries is available at the Commission's website at: https://mn.gov/puc/assets/MN%20DIP%20updated%20by%204.15.24%20Order%20Clean_tcm14-623149.pdf

[11] Minn. Stat. § 216B.16, subd. 4.

[12] Minn. Stat. § 216B.16, subd. 1.

[13] *See In the Matter of Updating the Generic Standards for the Interconnection and Operation of Distributed Generation Facilities Established under Minn. Stat. § 216B.1611*, Dkt. No. E-999/CI-16-521, ORDER MODIFYING PRACTICES AND SETTING REPORTING REQUIREMENTS, p. 7 (Minn. Pub. Util. Comm. Mar. 31, 2022) ("2022 Commission Order") https://www.edockets.state.mn.us/edockets/searchDocuments.do?method=showPoup&documentId={4084E17F-0000-CD19-93F4-3731AC9F8288}&documentTitle=20223-184288-01. (recognizing that commenters opposing Xcel's change to the TPL have valid concerns but stating that the Commission cannot make determination on TPL at this time); In the Matter of the Formal Complaint and Request for Relief by the Minnesota Solar Advocates, Dkt. No. E-002/C-23-424, ORDER DISMISSING COMPLAINT, p. 6 (Minn. Pub. Util. Comm. Feb. 27, 2024) ("2024 Commission Order") (order dismissed complaint without approving the TPL) (Record 000478).

with the statutory process for changing a rate or received the approval of the Commission, the Commission's decision implicitly allowing it to be implemented must be reversed and Xcel prohibited from enforcing it if and until the Commission has approved it consistent with the statutory process and determined that it is just and reasonable.

There is a Reasonable Basis to Investigate the Most Impactful Interconnection Rule/Policy/Practice/Standard in Minnesota.

If this Court determines that the Commission is not required to approve a significant rule/practice/policy/standard like the TPL before it is implemented by a public utility, then it must determine whether the Commission's decision is arbitrary and capricious, and supported by the record.

While Respondents argue that the TPL is based on maintaining the safety and reliability of its system, it is important to note that this position is not based on any actual evidence. And, as admitted by Xcel at the hearing, it is not based on any detailed analysis. It is purely based on the self-serving testimony and comments of Xcel and the hope that this Court and the Commission do not fully understand how solar generating systems operate. Xcel studies the impact of a solar generating system as if it will be generating its maximum amount of energy at the same time as the Daytime Minimum Load ("DML"), which is the minimum amount of electricity that is needed by all of the customers on their particular feeder on a particular day of the year. A solar generating system will never be generating its maximum amount of generation at the same time and day as the DML. A solar generating system will only generate its maximum generating capacity for a short period of time during a summer month sometime around noon, which is nowhere near the

same day and time of the DML. This, of course, is demonstrated by the fact that the majority of solar generation was installed before the TPL was implemented, and, yet, Xcel was unable to identify any particular safety or reliability issue created by the operation of those systems.

But, more importantly, Xcel's claim that it was exercising engineering judgment in implementing the TPL is contradicted by its testimony at the hearing on the complaint and inconsistent with the exercise of engineering judgment as defined by Minnesota Technical Interoperability and Interconnection Requirements ("TIIR"). As Commission staff noted in their Staff Briefing Papers, "At the heart of this Complaint is the issue of whether the TPS falls under a utility's engineering judgment or if it is a policy or rule that the Company must get Commission approval to implement."[14]

Commissioner Schuerger recognized the TPL was a policy decision, stating:

> I find it quite interesting that the company has proposed that for rooftop solar you could go to 100 percent of thermal limits. And it really reinforces, I think, the interpretation that you put forward, Commissioner Sullivan, and I think that Mr. Schiro confirm, which is – and, Commissioner Tuma, you talked about it as well, that really it's – it's positioning for headroom for future decisions. It looks -- in the context of that one, which will come before the Commission in the future, it's not before us today. That it's looking a lot more like a policy decision than a reliability decision.[15]

Which is consistent with Commissioner Tuma's line of questioning wherein he stated, "I mean, it could be that the company is just trying to buy headroom so that they can do the other things. And I suppose if that's the case, I'd like to know that, - but it's -- you're

[14] *See* Staff Briefing Papers, p. 8 (Record 000447).
[15] December 2023 Transcript, p. 62, lines 8-21.

couching as an energy engineering standard."[16] He then followed up saying, "I don't think that's irresponsible to say we're trying to buy ourselves some headroom," and then specifically asked, "It wouldn't bother me if it was, but I'm just trying to understand, are the engineers that nervous that they need to create some headroom?"[17] To which Xcel's engineer eventually responded, "We have to be able to have that additional headroom, flexibility, reliability recognizing that there is a difference."[18] To which Commissioner Sullivan stated, "So if I - Mr. Schiro, if I -- if I'm understanding that, what you're saying is, we need the TPS as it is currently structured because that gives us the headroom."[19] That the TPL is a policy choice is further highlighted by Xcel's admission that no detailed analysis was done to make it up, stating, "Chair, Commissioner Schuerger, you know, if you're looking for detailed spreadsheets and a full-on analysis - not necessarily to that point. But we just – in doing with engineering observations where we thought the system would be best operated to."[20]

Because Xcel's TPL was a policy decision, it required Commission approval before it could be implemented. Moreover, it could not be considered the exercise of engineering judgment because that is limited to making decisions related to the installation of particular DER designs, not establishing requirements that apply to all DER interconnection situations. The TIIR highlights this point stating:

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[16] *Id*., p. 53, lines 6-10.
[17] *Id*., p. 53, lines 23-25.
[18] *Id*., p. 55, lines 5-7.
[19] *Id*., p. 57, lines 1-4.
[20] *Id*., p. 21, line 2, to p. 24, line 5.

> With so many variations in Area EPS designs, it becomes complex to create a single set of interconnection requirements that fits all DER interconnection situations. The Area EPS Operator must maintain a level of engineering judgment in order to interconnect the wide range of technologies over a variety of Area EPS and DER characteristics and designs. The Area EPS Operator shall follow applicable industry standards and good utility practice when applying engineering judgment.[21]

So while nobody expects or has argued that a public utility to codify and receive approval from the Commission for every design aspect or variation that is possible "to interconnect the wide range of technologies over a variety of Area EPS and DER characteristics and designs," the Legislature and the public reasonable expects a public utility to receive approval for a generic rule/policy/practice/standard that applies to every interconnection.

CONCLUSION

Whether directing Xcel to conduct a futile meeting where no changes were made to the TPL, or even apparently reasonably considered, was a reasonable legislative act or not, the Commission never explains why it was unable to explicitly state that a public utility is not required have its rules, policies, practices or standards approved by the Commission prior to implementation or that the TPL is just, reasonable and consistent with the law if that is what the Commission believes. The public deserves, expects and needs the Commission to explain its positions when complaints are brought before it. Respondents

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[21] *See In the Matter of Updating the Generic Standards for the Interconnection and Operation of Distributed Generation Facilities Established Under Minn. Stat. § 216B.1611*, Dkt. No. E-999/16-521, ORDER ESTABLISHING UPDATED TECHNICAL INTERCONNECTION AND INTEROPERABILITY REQUIREMENTS, p. 1 (Minn. Pub. Util. Comm. Jan. 22, 2020) available at Commission's website at: https://mn.gov/puc/assets/TIIR%20w%20CORRECTED%20Interim%20Implementation%20Guidance_tcm14-431321.pdf.

often say that the Commission speaks through its orders, but that is apparently not true because neither of them ever explain how the words "we also reject" do not mean what they say in the 2022 Commission Order. Minnesota's clean energy future depends upon regulatory certainty and will not be achieved without it. As the Minnesota Attorney General's Office stated, "Answering the question of whether Xcel had authority independent of the Commission to implement the revised TPL is of critical importance to ensuring that regulated utilities adhere to Minnesota law. The Commission's answer to the question is similarly vital to the predictability and capacity of DER in Minnesota's future.[22] Neither the 2022 or 2024 commission orders provides that answer or the clear guidance that any reasonable person would expect from such an important regulatory agency on such an important decision, which is why Relator was required to turn to this Court to ask for the clear guidance and direction that the Commission failed to provide.

MINNESOTA SOLAR ENERGY
INDUSTRIES ASSOCIATION

Date: October 10, 2024

/s/ Curtis P. Zaun
Curtis P. Zaun (#0266310)
MnSEIA
445 Minnesota Street
Suite 730
St. Paul, MN 55101
Telephone: (651) 677-1602
Attorney for Relator

[22] *In the Matter of the Formal Complaint and Request for Relief by the Minnesota Solar Advocates against Northern States Power Company dba Xcel Energy*, Dkt. No. E-002/C-23-424, COMMENTS, p. 6 (Minn. Atty. Gen. Oct. 20, 2023) (Record 000282).

Certificate of Compliance

Pursuant to Rule 132.01, subd. 3, of the Minnesota Rules of Civil Appellate Procedure, Attorney for Relator states that this brief was prepared using Microsoft Word 365, complies with the typeface requirements of this rule, and contains 4,084 words.