BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John A. Tuma	Commissioner
Betsy Wergin	Commissioner

In the Matter of a Request for Dispute Resolution with People's Energy Cooperative Under the Cogeneration and Small Power-Production Statute, Minn. Stat. § 216B.164

ISSUE DATE: September 21, 2015

DOCKET NO. E-132/CG-15-255

ORDER FINDING JURISDICTION AND RESOLVING DISPUTE IN FAVOR OF COMPLAINANT

PROCEDURAL HISTORY

I. Request for Dispute Resolution

On March 12, 2015, Alan Miller filed a request for dispute resolution under Minnesota's cogeneration and small power-production statute, Minn. Stat. § 216B.164.

Mr. Miller, who owns a 10-kilowatt (kW) wind turbine, stated that his electric company, People's Energy Cooperative (People's or the Cooperative), had begun charging him a $5-per-month "facility fee" in February 2014. People's stated that the purpose of the fee was to recover the incremental costs associated with serving a distributed-generation customer, including "the administrative and physical work associated with Peoples' monthly processing of meter reads, energy purchases, state reporting requirements," and other unspecified infrastructure costs.

Mr. Miller stated that the new $5 fee was in addition to an existing $37-per-month fixed charge billed to all residential customers, and that People's was charging the additional fee only to those customers with distributed generation. He asserted that the fee was contrary to Commission rules and in violation of Minnesota law, including but not limited to Minn. Stat. § 216B.164, subd. 3(a).

II. People's Response

The Commission issued a notice requesting that People's respond to Mr. Miller's filing and provide copies of its 2014 and 2015 cogeneration and small power-production tariffs and schedules required under Minn. R. 7835.0300–.1100.

On April 1, 2015, People's filed a response to Mr. Miller's request, along with its 2013–2015 distributed-generation tariffs and supporting documentation. The Cooperative filed additional comments on April 6 and May 22.

People's stated that the intent of the $5 charge was to offset recurring costs unique to the existence of interconnected distributed-generation systems. People's argued that Minn. Stat. § 216B.164 permits such costs to be recovered if they are not already covered by other charges associated with a customer's existing service.

In later comments, People's stated that the fee was based on the facility fee it charges its dual-fuel customers. People's argued that using the dual-fuel facility fee as a model was appropriate because dual-fuel and distributed-generation systems share similar physical and administrative characteristics: both are interconnected to an existing electrical service, require the Cooperative to process multiple meter readings, and can require the installation of additional distribution equipment that adds to the cost of service.

III. Stakeholder Comments

From May 4 to July 17, 2015, the Commission received initial and/or reply comments from the following parties:

- Sam Villella
- Minnesota Municipal Utilities Association (MMUA)
- Minnesota Rural Electric Association (MREA)
- The Alliance for Solar Choice
- Clean Energy Organizations[1]
- Minnesota Solar Energy Industry Association (MnSEIA)
- The Minnesota Department of Commerce (the Department)
- Dairyland Power Cooperative (Dairyland)

MMUA, MREA, and Dairyland agreed with People's that a distributed-generation facility fee was permissible under Minn. Stat. § 216B.164. The other commenters supported Mr. Miller's position that People's fee violated the statute.

On August 13, 2015, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Background

The Minnesota Legislature has found that cooperative electric associations are effectively regulated by their membership and has therefore deemed it unnecessary to regulate them, with a few exceptions.[2]

[1] The Clean Energy Organizations were Fresh Energy, Environmental Law & Policy Center, Institute for Local Self-Reliance, and Minnesota Center for Environmental Advocacy.

[2] Minn. Stat. § 216B.01.

One such exception is Minn. Stat. § 216B.164, which sets forth the conditions under which electric utilities, including cooperatives,[3] must serve cogeneration and small power-production facilities, also referred to as "qualifying facilities."[4]

Qualifying facilities with a capacity less than 40 kW are billed for the net energy supplied by a cooperative "according to the applicable rate schedule for sales to that class of customer."[5]

Moreover, under a recent amendment to section 216B.164, a cooperative may charge qualifying facilities "an additional fee to recover the fixed costs not already paid for by the customer through the customer's existing billing arrangement."[6] This charge must be "reasonable and appropriate for that class of customer" based on the cooperative's most recent cost of service study.[7] This amendment only applies to facilities installed after July 1, 2015.

In the event of a dispute between a utility and a qualifying facility, either party may request a determination of the issue by the Commission.[8] The Commission is to construe the statute "in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public."[9] The burden of proof is on the utility.[10]

Finally, the prevailing party is entitled to its costs, disbursements, and reasonable attorneys' fees, except that a qualifying facility is not required to pay the utility's costs, disbursements, and attorneys' fees unless the Commission finds that the qualifying facility's claims were made in bad faith or are a sham or are frivolous.[11]

II. Positions of the Parties

A. People's

People's interprets pre-amendment section 216B.164 to allow recovery of the ongoing costs of serving qualifying facilities that are not covered by existing charges. People's pointed to three provisions of the statute to support its interpretation.

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[3] *See* Minn. Stat. § 216B.164, subd. 2 (providing that section 216B.164 applies to all Minnesota electric utilities, including cooperatives and municipal utilities).

[4] Under the federal Public Utility Regulatory Policies Act of 1978 (PURPA) and related regulations, a small power-production facility is a "qualifying facility" if its capacity does not exceed 80 megawatts (MW) and it uses biomass, waste, renewable resources, or geothermal resources as its primary energy source. 18 C.F.R. § 292.204. The Commission's rules adopt the federal definition of "qualifying facility." Minn. R. 7835.0100, subp. 19.

[5] Minn. Stat. § 216B.164, subd. 3(a) (Supp. 2015).

[6] 2015 Minn. Laws, 1st Spec. Sess., ch. 1, art. 3, § 21 (amending Minn. Stat. § 216B.164, subd. 3(a)).

[7] *Id.*

[8] Minn. Stat. § 216B.164, subd. 5.

[9] *Id.*, subd. 1.

[10] *Id.*, subd. 5.

[11] *Id.*

First, subdivision 1 states that the statute's intent is to encourage small power production "consistent with protection of the ratepayers and the public." People's argued that its $5 fee was intended to ensure that non-generating ratepayers do not subsidize the costs of interconnecting and serving qualifying facilities.

Second, subdivision 3(c), which states that "[i]n setting rates, the commission shall consider the fixed distribution costs to the utility not otherwise accounted for in the basic monthly charge and shall ensure that the costs charged to the qualifying facility are not discriminatory in relation to the costs charged to other customers of the utility." People's maintained that the $5 charge is for fixed distribution costs not accounted for in the initial basic monthly charge of $37.00 billed to all residential customers.

Finally, subdivision 8(b) states that "[n]othing contained in this section shall be construed to excuse the qualifying facility from any obligation for costs of interconnection . . . in excess of those normally incurred by the utility for customers with similar load characteristics who are not cogenerators or small power producers." People's argued that the additional costs it has identified are interconnection costs and exceed those caused by cooperative members who are not cogenerators or small power producers.

People's also claimed that four investor-owned utilities—Xcel Energy, Otter Tail Power, Interstate Power & Light, and Minnesota Power—charge net-metering fees ranging from $1.75 to $6.40 per month. People's argued that these fees provide authority for the monthly charge it has been imposing.

B. MMUA, MREA, and Dairyland

MMUA, MREA, and Dairyland agreed with People's that section 216B.164 allows a cooperative to recover the ongoing costs of serving a qualifying facility that are not covered by other charges associated with a customer's existing service.

MMUA, in particular, argued that section 216B.164 grants the Commission jurisdiction over the rates cooperatives pay their customers for net generation but not over the rates cooperatives charge their customers for service. Because the Legislature has decided that cooperatives are exempt from regulation absent a specific statutory directive and section 216B.164 addresses only payment for net generation, MMUA argued, the decision of whether and how much to charge qualifying facilities should be left to People's governing board.

C. The Clean Energy Organizations, Alliance for Solar Choice, and MnSEIA

The Clean Energy Organizations, the Alliance for Solar Choice, and MnSEIA supported Mr. Miller's petition. They disputed MMUA's contention that the Commission lacked jurisdiction to stop People's from imposing a fee on qualified facilities, arguing that subdivisions 2 and 5 of the statute expressly provide the Commission with jurisdiction over disputes between qualifying facilities and electric utilities, including cooperatives.

These commenters argued that the statute, before the 2015 amendment, does not permit the fee at issue here. Specifically, they argued that subdivision 3(a) limits the costs that a utility can charge qualifying facilities to "the net energy supplied by the utility according to the applicable rate schedule for sales to that class of customer" and that the 2015 amendment, expressly allowing the type of charge at issue, demonstrates that the statute did not allow for such a charge prior to 2015.

Finally, these commenters maintained that, even if a facilities charge were allowed under the statute, People's had failed to justify the charge it imposed. They acknowledged that People's had identified a number of costs associated with serving qualifying facilities but argued that the Cooperative had failed to provide any data on the amount of those costs or on the corresponding benefits of distributed generation.

D. The Department

The Department stated that Mr. Miller's contract does not appear to authorize People's to unilaterally implement new charges or fees for interconnection or fixed distribution services. The Department recommended that the Commission reject the charge and direct People's to submit a plan for refunding Mr. Miller the charges already collected. It also recommended that the Commission direct the Cooperative to identify other customers who were assessed similar charges and submit a plan for refunding the charges or notifying the customers of their right to a refund.

With respect to People's claim that certain other utilities have been charging a similar fee, the Department determined that those fees had been in place at least since the utilities filed their 2010 distributed-generation reports.[12] The Department suggested that the Commission might wish to open a new docket to request additional information from each utility on the implementation date of any net-metering charge and the docket in which the charge was approved.

E. People's Reply

At the Commission meeting, People's acknowledged that the Commission had jurisdiction to resolve the dispute, conceded that it did not make the required annual filings of its cogeneration and small power-production tariffs for the years 2013–2015,[13] and acknowledged that it did not use the uniform statewide contract for nine distributed-generation facilities, including Mr. Miller's, that had interconnected to its system before 2012.[14]

People's agreed to (1) file the required tariffs within 45 days, (2) work with the nine facilities to bring their contracts into conformity with the statewide contract, and (3) in light of the foregoing deficiencies, discontinue the $5 fee immediately and promptly refund all amounts collected.

People's made these concessions without waiving its arguments that section 216B.164 permits utilities to charge a fee to recover the unique costs of serving distributed-generation customers, or that its $5 fee was adequately supported.

III. Commission Action

As a preliminary matter, the Commission concurs with the Clean Energy Intervenors, the Alliance for Solar Choice, and MnSEIA that the Commission has jurisdiction to decide this dispute. Minn. Stat. § 216B.164, subd. 5, grants the Commission authority to resolve disputes between qualifying facilities and electric utilities. And subdivision 2 clarifies that "electric

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[12] *See* Docket No. E-999/PR-10-09.

[13] These filings are required by Minn. R. 7835.0300 and .0400.

[14] The statute requires the Commission to establish a uniform statewide contract for use between cooperatives and qualifying facilities having less than a 40 kW capacity. Minn. Stat. § 216B.164, subd. 6. The uniform contract is set forth in Minnesota Rules part 7835.9910.

utilities" includes "all Minnesota electric utilities, including cooperative electric associations and municipal electric utilities."

The parties dispute whether pre-amendment section 216B.164 permitted cooperatives to charge qualifying facilities a fee to recover fixed costs unique to those facilities. They also dispute whether People's has adequately supported its $5 fee. The Commission concludes that People's has not adequately supported its fee and therefore does not reach the statutory-interpretation issue.

People's argued that the charge was authorized by subdivision 3(c). Prior to the 2015 amendment, subdivisions 3(c) and 3(d) provided two alternative means of compensating small qualifying facilities for the energy they produce.[15] Under 3(c), a qualifying facility's net input is compensated based on the utility's avoided costs. However, under 3(d) a facility may instead elect to be compensated at the utility's average retail utility energy rate.

Subdivision 3(c) states that, "[i]n setting rates, the commission shall consider the fixed distribution costs to the utility not otherwise accounted for in the basic monthly charge and shall ensure that the costs charged to the qualifying facility are not discriminatory in relation to the costs charged to other customers of the utility." Subdivision 3(d) does not include this language.

People's argued that the above-quoted provision of 3(c) authorized its distributed-generation charge. However, People's conceded at hearing that Mr. Miller was being compensated at the average retail utility energy rate under 3(d). The Commission therefore concludes that subdivision 3(c)'s language regarding fixed distribution costs does not apply to Mr. Miller's facility.

The Commission need not reach the issue of whether the fee was permissible under subdivision 3(d) or other portions of the statute because the fee was not adequately supported in any case.

People's identified several categories of costs that it claimed were unique to qualifying facilities and were not included in the existing fixed charge. However, the Cooperative did not attempt to quantify these costs on a company-wide or per-customer basis. Instead, People's adopted the $5 facility charge that it uses for its dual-fuel customers, asserting that dual-fuel customers and qualifying facilities share similar characteristics.

Subdivision 1 requires the Commission to construe the statute in accordance with its intent to give maximum possible encouragement to cogeneration and small power production consistent with protection of ratepayers and the public. Generic statements claiming similarities between dual-fuel customers and qualifying facilities do not suffice to justify standalone fees for qualifying facilities, given this strong statutory admonition.

For the foregoing reasons, the Commission will resolve this dispute in favor of Mr. Miller and, as required by the statute, will award him his costs, disbursements, and reasonable attorney's fees.

[15] *See* Minn. Stat. § 216B.164, subd. 3(a) (Supp. 2015) (providing that a qualifying facility having less than 40 kW capacity must be compensated at a rate determined under paragraph (c) or (d)). A third compensation mechanism, under new subdivision 3(f), was added in 2015.

Further, Minnesota Rules parts 7835.0300 and .0400 require utilities, including cooperatives, to make annual filings of their cogeneration and small power-production tariffs with the Commission for its review and approval. As People's has acknowledged, the Cooperative failed to file these tariffs in 2013–2015. Most concerning, People's failed to file a revised tariff in 2014 when it imposed the new fee on its distributed-generation customers. Accordingly, the Commission finds People's in violation of Minn. R. 7835.0300 and .0400.

The Commission will accept People's agreement to cease charging the monthly fees to Mr. Miller and all other qualifying facilities and to refund with interest all fees collected from Mr. Miller and all other qualifying facilities. And the Commission will require People's to make a compliance filing that includes (1) a new tariff with the fee removed and (2) verification that refunds have been made, including a list of all qualifying facilities that have been charged the fees and the amount of the refund.

Finally, People's claimed that certain other utilities charge net-metering fees similar to the fee at issue here. The Department suggested that the Commission might wish to open a new docket to request additional information from each utility on the implementation date of any net-metering charge and the docket in which the charge was approved.

The Commission concurs with the Department's recommendation and will direct its staff to open a docket and ask each investor-owned utility, cooperative, and municipal utility to indicate whether it applies a charge to net-metered or distributed-generation customers that is not applied to other customers, and if so, when it began assessing that charge and in which docket(s), if any, the charge was approved by the Commission.[16] Staff may request other related information as it deems appropriate.

ORDER

1. The Commission finds that it has jurisdiction over this matter.

2. The Commission resolves the dispute in favor of the Complainant and finds that People's has failed to demonstrate that the fee it has imposed meets the criteria of Minn. Stat. § 216B.164.

3. The Commission finds that as the prevailing party, Mr. Miller should be awarded any costs, disbursements, and reasonable attorney's fees related to pursuing this dispute. Mr. Miller shall make a filing with the Commission within 30 days of this order detailing any costs for which he seeks reimbursement.

4. The Commission finds People's in violation of Minn. R. 7835.0300 and .0400 for failing to file the proposed fee changes in 2014.

[16] *See In the Matter of a Commission Inquiry into Fees Charged to Qualifying Facilities*, Docket No. E-999/CI-15-755.

5. The Commission accepts People's agreement to cease charging the monthly fees to Mr. Miller and all other qualifying facilities and to refund with interest all fees collected from Mr. Miller and all other qualifying facilities. People's shall make a compliance filing within 60 days of this order that includes (1) a new tariff with the fee removed and (2) verification that refunds have been made, including a list of all qualifying facilities who have been charged the fees and the amount of the refund.

6. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf
Executive Secretary

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