

# Minnesota Public Utilities Commission

## Staff Briefing Papers

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Meeting Date: August 11, 2016

Agenda Item #

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Company: Cooperative Electric Associations

Docket Nos.: **E999/PR-16-09**  
**E121/CG-16-240**  
**E123/CG-16-241**  
**E999/CI-16-512**

### **In the Matter of Cogeneration and Small Power Production Filings**

**In the Matter of a Request for Dispute Resolution by Keith Weber, the Qualifying Facility, with Meeker Cooperative Light and Power Association under the Cogeneration and Small Power Production Statute, Minn. Stat. §216B.164**

**In the Matter of a Complaint of Larry Fagen against Minnesota Valley Cooperative Light & Power Association**

**In the Matter of a Commission Investigation into Fees Charged to Qualifying Facilities by Cooperative Electric Associations under the 2015 Amendments to Minn. Stat. § 216B.164, Subd. 3**

Issue: Should the Commission grant the Minnesota Rural Electric Association, Novel Energy Solutions and/or Minnesota Solar Energy Industries Association Petitions for Clarification of the June 27, 2016 Order Opening Investigation, Delegating Authority and Finding that Tariffs Must be Approved Before Becoming Effective?

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### Relevant Documents

Order Opening Investigation, Delegating Authority, and Finding that Tariffs Must Be Approved Before Becoming Effective ..... June 27, 2016  
MREA's Petition for Clarification..... June 28, 2016  
Environmental Law and Policy Center and Fresh Energy's Answer and Petition ..... July 11, 2016

Minnesota Solar Energy Industries Association’s Response .....July 13, 2016  
Novel Energy Solution’s Petition for Clarification .....July 13, 2016

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

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## STATEMENT OF ISSUE

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Should the Commission grant the Minnesota Rural Electric Association, Novel Energy Solutions and/or Minnesota Solar Energy Industries Association's Petitions for Clarification of the June 27, 2016 Order Opening Investigation, Delegating Authority and Finding that Tariffs Must be Approved Before Becoming Effective?

## BACKGROUND

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On June 27, 2016, the Commission issued its Order Opening Investigation, Delegating Authority and Finding that Tariffs Must be Approved Before Becoming Effective in Dockets E999/PR-16-09, E121/CG-16-240, E123/CG-16-241 and E999/CI-16-512.

On June 28, 2016, Minnesota Rural Electric Association (MREA) filed a petition for clarification of the above referenced Order.

On July 11, 2016, the Environmental Law and Policy Center (ELPC) and Fresh Energy responded to MREA's petition and recommended the Commission deny the MREA's petition.

On July 13, Novel Energy Solutions (NES) filed a separate petition for clarification of Commission's Order.

On July 13, the Minnesota Solar Energy Industries Association (MnSEIA) filed an answer to MREA's Petition in addition to its own petition for clarification of the Commission's Order.

## Summary of Issue

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In its June 27, 2016 Order, the Commission opened a generic investigation (a) to investigate the appropriate methodology or methodologies for establishing electric cooperatives' fees under Minn. Stat. § 216B.164, subd. 3; and (b) to review and determine whether the specific fees charged or filed by electric cooperative associations under Minn. Stat. § 216B.164, subd. 3 comply with the requirements of Minn. Stat. § 216B.164.

In its Order, the Commission also made a finding that cogeneration and small-power-production tariffs must be filed with—and reviewed and approved by—the Commission, before becoming effective.

MREA, NES and MnSEIA subsequently filed petitions for clarification of the order. MREA stated that the Order does not address whether annual tariff compliance filings (and rates, fees and charges included within the filings) must be approved before becoming effective, requesting clarification to fully understand the scope and intent of the Order. MnSEIA requested that the Commission specifically clarify that “becoming effective” means any fee that results from the conclusion of the Commission investigation will only apply to systems installed after the fee is approved. NES requested in its Petition that the Commission clarify that tariffs imposed under Minn. Stat. § 216B.164, subd. 3(a) will not be in effect for any co-generation or small-power-

production facilities interconnected before the Commission reviews and approves the cost recovery fees.

## June 27, 2016 Order

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The June 27, 2016 Order included the following language in regard to the Commission’s authority to review and approve fees.<sup>1</sup>

### **I. Summary of Commission Action**

The Commission finds that it has jurisdiction to investigate fees proposed or imposed under Minn. Stat. § 216B.164, subd. 3, including the methodologies underlying the cost studies on which they are based. The Commission also finds that it has jurisdiction to determine whether individual utilities’ fees are “reasonable and appropriate,” as the statute requires, and to make any other determinations necessary to ensure utility compliance with Minn. Stat. § 216B.164.

The Commission finds that cogeneration and small-power-production tariffs must be filed with—and reviewed and approved by—the Commission, before becoming effective.

The Commission will open a generic investigation (a) to investigate the appropriate methodology or methodologies for establishing electric cooperatives’ fees under Minn. Stat. § 216B.164, subd. 3; and (b) to review and determine whether the specific fees charged or proposed by electric cooperative associations under Minn. Stat. § 216B.164, subd. 3 comply with the statute. This investigation will include the fee at issue in complaint docket E-121/CG-16-240. The Commission will delegate procedural management of the investigation to the Executive Secretary.

In regard to the Effective date of Tariffs and fees authorized under Minn. Stat. § 216B.164, subd. 3(a) the Order states the following:

### **IV. Effective Date of Tariffs**

Finally, the Commission clarifies that co-generation and small-power-production tariffs—including those setting the fees newly authorized under Minn. Stat. § 216B.164, subd. 3 (a)—must be reviewed and approved by the Commission before becoming effective, as provided under Minn. R. 7835.0300:

Within 60 days after the effective date of this chapter, on January 1, 1985, and every 12 months thereafter, each utility must file with the commission,

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<sup>1</sup> The motion containing the findings and actions passed 5-0. See minutes from June 9, 2016.

for its review and approval, a cogeneration and small power production tariff. . . .

## Parties' Positions

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### *Minnesota Rural Electric Association (MREA)*

In its Petition MREA stated it believes Commission authority to review and approve tariff filings is very limited in statute, and suspending board-approved fees exceeds the Commission's jurisdiction. MREA stated further that it is not clear from the order what action the Commission is taking with respect to suspending cost recovery fees and approval of annual cogeneration compliance tariff filings generally. According to MREA, the Commission did not specifically respond to the issue of whether annual tariff compliance filings (and rates, fees and charges included within the filings) must be approved before becoming effective and therefore MREA requested clarification so it could fully understand the scope and intent of the order.

### *Novel Energy Solutions (NES)*

NES agreed with MREA that the Order does not specifically address the question of the effectiveness of the cost recovery fees, which has led to confusion in the marketplace. Specifically, NES stated that it is unclear if solar arrays interconnected before the Commission deems the fees to be effective will be subject to said fees in the future.

According to NES, these fees threaten the viability of cogeneration and small-power production facilities, and as such, customers are currently hesitant to move forward. Because the investigation may proceed for an extended period of time, NES stressed the importance of bringing clarity to the matter in the near term, given the current negative impacts on customers and its business.

### *MnSEIA*

In its Answer to the MREA's petition, MnSEIA stated that Minn. Stat. §§ 216B.164 and 216A.05 gives the Commission authority to require that the fees are approved prior to being applied to the cooperative utilities, as outlined in Minn. R. 7835.0300. MnSEIA noted that Minn. R. 7835.0300 described the Commission's statutory obligation for its review and approval of filed tariffs.

According to MnSEIA, the ability to approve or not approve the tariffs filed in accordance with Minn. R. 7835.0300 is a necessary Commission function. MnSEIA argued that this rule gives the Commission direct authority to approve or deny tariffs, through its requirement that "each utility must file with the commission, for its review and approval, a cogeneration and small power production tariff."

According to MnSEIA, the Commission opted to not approve the tariffs in its June 27, 2016 Order, because any utility added fees have an impact upon whether the tariff is reasonable, appropriate and should be approved under the rule.

In addition, MnSEIA stated that Minn. Stat. § 216B.1611 grants the Commission broad authority to establish various standards for integrating renewable energy onto utility grids and this includes jurisdiction over cooperative and municipal utilities, which were also required to “adopt a distributed generation tariff that addresses the issues included in the commission’s order.” MNSEIA argued that this statutory precedent requires that the utilities refile the tariff on an annual basis, and this is a reasonable and appropriate approach to ensure that the cooperative’s tariffs remain consistent with Commission orders and Minn. Rules.

Pursuant to Minn. R. 7829.3000, MnSEIA submitted its own Petition for Clarification to be considered instead of MREA’s petition. MnSEIA’s petition requested that the Commission specifically state that “becoming effective” means any fee that results from the conclusion of the Commission investigation will only apply to systems installed after the fee is approved.

According to MnSEIA, the Order is unclear whether a system installed while the investigation is ongoing is subject to fees. MnSEIA is requesting clarification on whether “becoming effective” means before the fee can be applied to Qualifying Facilities installed after July 1, 2015, or does it mean before the fee can be applied to any Qualifying Facilities at all?

Since the order was published, MnSEIA claimed installers have had a difficult time selling systems, because customers are too afraid to buy systems that may be subject to fees. Therefore, MnSEIA stated it is important that this issue is resolved quickly and upfront. Because a statewide investigation into cooperative fees has the potential to be a lengthy and drawn-out process, MnSEIA stated this could deprive several homeowners and business owners of months of solar production, slow the onset of renewable energy, and harm local solar businesses.

*The Environment Law & Policy Center (ELPC) and Fresh Energy*

ELPC and Fresh Energy requested that the Commission deny MREA’s June 28, 2016 Petition for Clarification. They argued that MREA’s petition for clarification does not meet the standards for a post order petition pursuant to Minn. R. 7829.3000. According to ELPC and Fresh Energy, the petition does not raise any new issues or arguments or identify any specific grounds for error. ELPC and Fresh Energy noted that the Commission’s rules of practice do not describe “petitions for clarification,” although Minn. R. 7829.3000 does allow parties “aggrieved and directly affected” by a commission decision or order to file a “petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.” Aggrieved parties must “set forth specifically the grounds relied upon or errors claimed” in their petition and requests for amendment “must set forth the specific amendments desired and the reasons for the amendments.” ELPC and Fresh Energy argued that MREA’s Petition for Clarification fails to meet these standards.

Furthermore, ELPC and Fresh Energy stated there is no ambiguity in the Order that the fees and tariffs at issue must be reviewed and approved by the Commission before becoming effective. According to ELPC and Fresh Energy, the Commission’s statements on this point are clear and do not require clarification. The Parties noted that the Commission, in its June 27, 2016 Order, determined that it has jurisdiction to review the fees proposed or imposed by Minnesota Electric Cooperatives under Minn. Stat. § 216B.164 subd. 3, and that any such fees “must be filed with—

and reviewed and approved by—the Commission, before becoming effective.” Although MREA claimed that clarification is necessary because the Commission’s Order “did not specifically respond” to the issue of “whether annual tariff compliance filings (and rates, fees and charges included within the filings) must be approved before becoming effective,” ELPC and Fresh Energy stated the Commission findings and statements are clear and do not require clarification.

In response to MREA’s argument that “it is not clear from the order what action the Commission is taking with respect to suspending cost recovery fees and approval of annual cogeneration compliance tariff filings generally,” ELPC and Fresh Energy, the Commission’s Order is clear that co-generation and small power-production tariffs must be approved before becoming effective and it is undisputed that the Commission has not yet reviewed or approved any of the fees and tariffs at issue in this docket. Therefore, according to the Parties, under the plain language of the Commission’s Order, these fees and tariffs are not “effective” and cannot be charged to customers until the Commission concludes its investigation to “review and determine whether the specific fees charged or proposed by specific electric cooperative associations under Minn. Stat. § 216B.164, subd. 3 comply with the statute.”

## Staff Discussion

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Staff provides the following factual background to aid the Commission’s consideration of the various claims raised by the petitions for clarification.

On March 22, 2016, in Docket 16-240, Keith Weber filed a complaint against Meeker Cooperative Light and Power Association (Meeker) regarding, among other things, the fixed cost fee that Meeker was charging the complainant pursuant to Minn. Stat. § 216B.164, subd. 3(a). Upon investigation, staff learned that Meeker had not tariffed this fee for Commission review and approval as required by Minn. R. 7835.0300 before it began collecting the fee.

Between April 11 and May 9, 2016, ten Cooperative Electric Associations (CEA), including Meeker, filed updated DG tariffs that included the fixed cost fee authorized by Section 216B.164, subd. 3(a). Meeker filed its updated tariff on April 20, 2016.

On May 9, 2016, Fresh Energy and ELPC filed a joint petition objecting to the fixed cost fees contained in 10 CEA tariff filings because they were inconsistent with statutory requirements. The joint petition requested that the Commission review the tariff filings and find that the CEAs cannot lawfully implement any revised tariffs until the revised tariffs have been approved by the Commission.

Staff’s investigation to date indicates that approximately 10 additional CEAs have since filed updated DG tariffs with the fixed cost fee. Several of the CEAs, like Meeker, have set effective dates for the DG fixed cost fee that are days, and in other cases months, before the filing date of the tariff, apparently in an effort to be able to keep fixed cost fees they have collected before they tariffed the fee before collection as required by law. In addition, staff is aware from a review of CEA websites that at least two CEAs are collecting the fee but have not yet made the tariff filing that is required before the fee can be collected. There appear to be a few CEAs who properly

identified an effective date for their fixed cost fees that is after the filing date of the updated tariff containing the fees.

The Commission's review of the tariffed fixed cost fees is governed by Minn. R. ch. 7835, which identifies certain substantive and procedural requirements for the CEAs DG tariffs generally. Chapter 7835 requires the co-operatives to annually file their DG tariffs "with the Commission, for its review and approval."<sup>2</sup> The tariffs must include certain schedules of information as set forth in the chapter,<sup>3</sup> but in the event there are no changes in the tariff other than the annual calculation of the CEA's average retail utility energy rates, the CEA need only file the new Schedule C and not the rest of the DG Tariff.<sup>4</sup> Until the co-operatives' tariffed their new fixed cost fees starting in April<sup>5</sup>, staff cannot remember an instance when a past DG tariff filing raised any issue that prompted the Commission to consider whether to reject or modify the tariff.

The Commission's review is also governed by Minn. R. 7829.1400, which identifies the review process when an objection has been filed with the Commission regarding a "miscellaneous filing" such as the CEAs April DG tariff filings. The rule provides that a person may comment on a new tariff provision within 30 days of its filing, including recommending that the filing be rejected, denied, or modified. In that case the commenter must identify the proposed process required for the Commission make a determination about whether to reject, deny, or modify the tariffed provision as recommended by the commenter.

That is what happened in this case. And based on the allegations contained in Fresh Energy and ELPC's joint petition objecting to the CEAs' fixed cost fees, and on further information gathered by staff, the Commission decided to open a generic investigation to review the fixed cost fees the CEAs are proposing to collect. To avoid confusion, the Commission's order clearly stated that DG tariffs are subject to the Commission's review and approval, and until approved are not effective. In other words, because the new fixed cost fees that CEAs have included in their DG tariffs are currently being investigated by the Commission to determine whether they should be approved, rejected, or modified, they are not effective and cannot be collected.

Staff did not understand the Commission's order to suggest that any DG tariff rates, terms, and conditions that have been previously filed and are already in effect are included in the Commission's investigation of CEA fixed cost rates and therefore not effective. Nor did staff understand the Commission's order to suggest that it was making any determination about who is subject to the CEA's fixed cost fees and under what circumstances. Those issues will be reviewed in the course of the Commission's investigation.

Staff believes that one other issue warrants discussion. Staff observes that the Commission has in the past allowed a utility to take an action that otherwise could not be taken prior to Commission approval where circumstances warranted doing so. Specifically, the Commission has allowed utilities to close affiliated interest transactions prior to Commission approval subject to the Commission later disallowing or modifying the transaction. In short, the utility may proceed at its own risk where the timing requirements of the transaction warrant taking the risk

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<sup>2</sup> Minn. R. 7835.0300.

<sup>3</sup> See Minn. R. 7835.0500- 7835.1100.

<sup>4</sup> Minn. R. 7835.0400.

<sup>5</sup> Some tariffs were also filed in May.



that subsequent later Commission disapproval would require the transaction to be abrogated. By raising this issue staff does not mean to suggest that the facts and policy considerations surrounding the tariffed fixed cost fees support allowing the CEAs to collect the fees subject to refund based on the fees being later rejected or modified by the Commission. That is an issue for the Commission to determine.

## Decision Options

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### A. MREA Petition for Clarification

1. Grant the MREA Petition for clarification of the Commission's June 27, 2016 Order.<sup>6</sup>
2. Deny the MREA petition for Clarification

### B. NES's Petition for Clarification

1. Grant the NES petition for clarification of the Commission's June 27, 2016 Order and clarify that tariffs imposed under Minn. Stat. § 216B.164, subd. 3 (a) will not be in effect for any co-generation or small-power-production facilities interconnected before the Commission reviews and approves the cost recovery fees.
2. Deny the NES petition for clarification.

### C. MnSEIA Petition for Clarification

1. Grant the MnSEIA petition for clarification of the Commission's June 27, 2016 Order and clarify that "becoming effective" means any fee that results from the conclusion of the Commission investigation will only apply to systems installed after the fee is approved.  
Deny the MnSEIA petition for clarification.

### D. Other Action by the Commission

1. On its own motion, clarify that the CEAs' tariffed fixed cost fees are not yet approved and effective and therefore cannot be collected.
2. On its own motion, clarify that a CEA's tariffed fixed cost fees can be collected during the course of the Commission's investigation of the fees subject to refund to customers based on the fees being later rejected or modified.

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<sup>6</sup> Staff notes that the Commission may need to draft language for clarification that meets MREA's request, if it chooses to grant the MREA petition for clarification.