BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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John Tuma	**Commissioner**
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Daniel Lipschultz	**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	**Docket No. E-132/CG-15-255**

RESPONSE OF DAIRYLAND POWER COOPERATIVE TO REPLY COMMENTS

INTRODUCTION

On March 11, 2015, a member ("Member") of People's Energy Cooperative ("PEC") filed a request with the Minnesota Public Utilities Commission ("Commission") for resolution of a dispute relating to the recovery of a $5.00 monthly fee to recover fixed utility costs from customer-owned electric generating facilities with which it is interconnected.

Dairyland is a non-profit generation and transmission ("G&T") electric cooperative headquartered in La Crosse, Wisconsin. Dairyland is owned by and provides the wholesale power requirements for 25 separate distribution cooperatives in southeastern Minnesota, western Wisconsin, northern Iowa, and northern Illinois. Dairyland's member distribution cooperatives serve retail load primarily in rural areas. PEC is a distribution cooperative member of Dairyland, as are Freeborn-Mower Cooperative Services and Tri-County Electric Cooperative.) Together, the Minnesota distribution cooperatives members of Dairyland have a combined total of approximately 35,000 members, almost all of whom are residential or farm members. Dairyland also provides

wholesale power requirements for two municipal systems located in Minnesota (Lanesboro Public Utilities and City of St. Charles).

On June 5, 2015, the Commission issued its Second Notice of Extended Comment Period setting a July 16, 2015, deadline for filing reply comments. Dairyland's reply comments will address issues raised by the Minnesota Solar Energy Industry Association ("SEIA"), the Alliance for Solar Choice ("Solar Choice") and Fresh Energy, Environmental Law & Policy Center, Institute for Local Self-Reliance and Minnesota Center for Environmental Advocacy (collectively, "Clean Energy Organizations"), and to the July 6, 2015 Comments submitted by the Minnesota Department of Commerce, Division of Energy Resources ("DOC Comments").

COMMENTS

I. MINN. STAT. § 216B.164 DOES NOT PROHIBIT PEC'S CHARGE.

A. Minn. Stat. § 216B.164 after July 1, 2015.

Cogeneration and small power production in Minnesota is addressed in Minn. Stat. § 216B.164. At issue is whether PEC's $5.00 monthly charge is permissible under § 216B.164, and in particular § 216B.164 Subd. 3. At the time this request for resolution of a dispute was submitted to the Commission, § 216B.164 Subd. 3(a) provided as follows:

> Subd. 3. **Purchases; small facilities.** (a) This paragraph applies to cooperative electric associations and municipal utilities. For a qualifying facility having less than 40-kilowatt capacity, the customer shall be billed for the net energy supplied by the utility according to the applicable rate schedule for sales to that class of customer. In the case of net input into the utility system by a qualifying facility having less than 40-kilowatt capacity, compensation to the customer shall be at a per kilowatt-hour rate determined under paragraph (c) or (d).[1]

However, in the special session of the legislature that ended earlier this year, § 216B.164 Subd. 3(a) was amended, with the new statutory language underlined and deleted language lined out:

[1] Minn. Stat. § 216B.164 Subd. 3(a) (2014).

> Subd. 3. Purchases; small facilities. (a) This paragraph applies to cooperative electric associations and municipal utilities. For a qualifying facility having less than 40-kilowatt capacity, the customer shall be billed for the net energy supplied by the utility according to the applicable rate schedule for sales to that class of customer. A cooperative electric association or municipal utility may charge an additional fee to recover the fixed costs not already paid for by the customer through the customer's existing billing arrangement. Any additional charge by the utility must be reasonable and appropriate for that class of customer based on the most recent cost of service study. The cost of service study must be made available for review by a customer of the utility upon request. In the case of net input into the utility system by a qualifying facility having less than 40-kilowatt capacity, compensation to the customer shall be at a per kilowatt-hour rate determined under paragraph (c) ~~or~~, (d), or (f).[2]

No commenter argued that for net metered systems installed after July 1, 2015, effective date of the amendment to § 216B.164 Subd. 3(a), PEC may, under the statute, implement a charge such as the one at issue here. The new language added to § 216B.164 Subd. 3(a) gives cooperatives and municipal utilities express authority to charge net energy-billed customers an additional fee to recover the fixed costs not already paid for by the customer through the customer's existing billing arrangement. *See*, SEIA Reply Comments, at 2, 3; DOC Comments, at 7 ("The Department reads Minn. Stat. §216B.164 to permit utilities to seek recovery of only the incremental cost of serving a QF.") Although the DOC Comments "offer[s]…observations"[3] on how a "reasonable and appropriate" charge may be determined, that issue is not before the Commission at this time in this docket.[4]

B. Minn. Stat. § 216B.164 prior to July 1, 2015.

Before the amendment of § 216B.164 Subd. 3(a) in the recent Special Session, Subd. 3(a) provided only for net energy billing by cooperatives to qualifying facilities ("QFs) having less than 40 kilowatt ("kW") capacity, and specified such a QF be compensated for energy delivered to the

[2] 2015 Minnesota Session Laws, Chapter 1, H.F. No. 3, Sec. 21 (available at: https://www.revisor.mn.gov/laws/?year=2015&type=1&doctype=Chapter&id=1&format=pdf).
[3] DOC Comments, at 7-9.
[4] *See also*, SEIA Reply Comments, at 2.

cooperative in excess of that used by the QF, at a per kilowatt-hour ("kWh") rate. The SEIA argues that because § 216B.164 Subd. 3(a) only addressed net energy billing, no other charges could be imposed on a QF with a capacity of less than 40 kW.[5] Although § 216B.164 Subd. 3(a) is not ambiguous in that it only addresses net energy billing, if Subd. 3(a) needs to be construed, putting Subd. 3(a) in context supports the unambiguous language in Subd. 3(a) that it only addresses net energy billing.

Considering § 216B.164 Subd. 3(a) in context shows that the statute authorizes a cooperative to implement other charges to recover its costs for which it is not compensated under the energy rate applicable to both the utility and the QF for purposes of net energy metering. SEIA acknowledges that § 216B.164 Subd. 3(a) only addressed net energy billing. Section 216B.164 Subd. 3(a) provides that a QF having less than 40 kW capacity owned by a cooperative customer shall be billed for the net energy supplied by the utility according to the applicable rate schedule for sales to that class of customer. Likewise, compensation by a cooperative for QF having less than 40 kW capacity is at a per kilowatt-hour rate (*i.e.*, the rate for energy).

While § 216B.164 Subd. 3(a) addressed net energy billing for QFs, other provisions in § 216B.164 allow for charges in addition to the net energy billed to the QF. Fixed distribution costs to the utility not otherwise accounted for in the basic monthly charge are to be considered under § 216B.164 Subd. 3(c). If all utility costs were to be recovered by only billing the customer for the net energy supplied by the utility, there would be no reason to consider fixed distribution costs to the utility not otherwise accounted for in the basic monthly charge. In addition, § 216B.164 Subd. 6(b) emphasizes that nothing in § 216B.164 excuses the QF from any obligation for costs of interconnection and wheeling in excess of those normally incurred by the utility for customers with similar load characteristics who are not cogenerators or small power producers.

Section 216B.164 Subd. 3(a) does not limit the ability of a cooperative to recover its costs incurred as a result of the QF selling its excess energy to the cooperative only to net energy billing

[5] SEIA Comments, at 2-3.

for the surplus energy purchased by the QF. All that section does is state that excess energy must be net billed. Considering Subd. 3(a) in context with other portions of § 216B.164 show that additional charges to recover costs not otherwise recovered through the energy rate may be the subject of separate charges.

Second, construing § 216B.164 Subd. 3(a) to limit a cooperative's ability to recover its costs would be contrary to Minnesota law. Under Minnesota law, the powers of an administrative agency are dependent upon the statute from which it derives its authority. For example, in *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639 (Minn. 1984), the Minnesota Supreme Court reversed a Commission decision ordering a cooperative to issue a refund to its members payments made to the cooperative prior to the time its members elected for the cooperative to become subject to the Commission's ratemaking authority. The Supreme Court reaffirmed that "[t]he extent of jurisdiction or authority bestowed upon an administrative agency is measured by the statute from which it derives its authority"[6] and explained that "[a]uthority is not obtained by the agency's own acts or by its assumption of authority."[7] Even though the cooperative subsequently became rate-regulated by the Commission through the statutory election process, the Commission could not order a refund covering the time the cooperative was not rate-regulated. The Court rejected the notion that the Commission could "confer[…] upon itself a broad retroactive jurisdiction."[8] (Emphasis added.)

Prior to the amendment of Minn. Stat. § 216B.164 Subd. 3(a) in the recent Special Session, Subd. 3(a) only required net billing for energy. But Subd. 3(a) did not require only net energy billing for energy. In other words, Subd. 3(a) did not prohibit extra charges by a cooperative to recover costs that were not recovered via its kWh energy charges. Since PEC is not rate-regulated

[6] *See, McKee v. County of Ramsey*, 310 Minn. 192, 195, 245 N.W.2d 460, 462 (1976).
[7] *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984)
[8] *Id*.

by the Commission, the authority whether or not to use extra charges to recover costs that were not recovered via its kWh energy charges remained with the Board of Directors of PEC.[9]

In fact, Minn. Stat. § 216B.01 reinforces how the fundamental principle of administrative law that the powers of an administrative agency are dependent upon the statute from which it derives its authority applies to the Commission and cooperatives. In pertinent part, § 216B.01 expressly limits the Commission's jurisdiction over cooperatives:

> . . .Because . . . cooperative electric associations are presently effectively regulated and controlled by the membership . . ., it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein."[10]

Recently, this Commission explained that it respects the legislature's chose to regulate cooperatives differently than public utilities. In approving the sale of Interstate Power & Light Company's Minnesota assets and load to Southern Minnesota Energy Cooperative ("SMEC"), the Commission stated:

> [B]ecause [SMEC] is an electric cooperative association, the Commission must also be guided by the Legislature's findings concerning electric cooperatives. The Legislature has found that "cooperative electric associations are presently effectively regulated and controlled by the membership under the provisions of chapter 308A . . . ." This finding informs the Commission's reasoning about the proposed transaction's relationship with the public interest.[11]

Since § 216B.164 Subd. 3(a) did not prohibit PEC from implementing the charge that is the subject of this proceeding; that decision remains with the PEC Board of Directors.[12]

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[9] The new language effective after July 1, 2015 addressing other charges does not, in and of itself, demonstrate that prior to the Special Session, Subd.3(a) excluded charges in addition to net energy billing. This request for dispute resolution was pending prior to the Special Session. The new language addressing may have been the legislature's statement confirming what it believed to be the effect of Subd. 3(a) as originally enacted.

[10] *See also, Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, *supra*, at 643.

[11] *In the Matter of a Request for the Approval of the Asset Purchase and Sale Agreement Between Interstate Power and Light Company and Southern Minnesota Energy Cooperative*, Docket No. E-001, 115, 140, 105, 139, 124, 126, 145, 132, 114, 6521, 142, 135/PA-14-322 and E-100/PA-07-540, at 3-4 (June 8, 2015).

[12] Some commenters have apparently assumed that after July 1, 2015, § 216B.164 Subd. 3(a) takes away from a cooperative's elected Board of Directors the cooperative's authority to establish its rates. Nothing in the new language of Subd. 3(a) suggests that result. While the new language describes what should go into developing "reasonable and appropriate" charges, it does provide for a ratemaking proceeding before the Commission must be conducted before such charges may be implemented. In fact, the new language implies that cooperatives remain self-regulating in establishing such charges. Included in the new language is the following requirement: "The cost of

SEIA, Solar Choice, and the Clean Energy Organizations focused on the language in § 216B.164 Subd. 1 stating that § 216B.164 should be construed in accordance with the "intent to give the maximum possible encouragement to cogeneration and small power production…." They ignore, however, the tempering language that the "maximum possible encouragement" must be "consistent with protection of the ratepayers and the public." That is all that PEC's charge is attempting to accomplish. The charge is intended to recover costs not otherwise recovered through the energy rate applied using net energy billing. If PEC were not able to recover those costs, they would have to be paid by other PEC members that are not QFs.[13] That would not be "consistent with protection of the ratepayers and the public" as required by § 216B.164 Subd. 1.

No person has contended that PEC has not properly netted energy delivered to PEC by the QF against the energy delivered by PEC to the QF. For that reason and the reasons stated above, the Commission should decide that PEC's charge is authorized.

C. Membership Service Agreement.

The DOC Comments claim that nothing in the sections of the Membership Service Agreement ("MSA") between PEC and the Member (Sections 3.1 and 4.1) "authorizes the Cooperative to unilaterally implement future rate changes."[14]

Dairyland disagrees. As explained by PEC in its Response to Comments, Section 5.1 of the Agreement incorporates the "Terms and Conditions" attached to the MSA into the Agreement and, they are made a part of the MSA. Those Terms and Conditions are clearly included in a PEC Rate Schedule. PEC's bylaws provide that PEC's Rate Schedules that are "…from time to time … fixed by the [PEC] Board."

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service study must be made available for review by a customer of the utility upon request." That requirement would be superfluous if a ratemaking proceeding before the Commission was required to establish such charges.

[13] Because PEC is a not-for-profit cooperative without shareholder, its members are responsible for all of PEC's costs.

[14] DOC Comments, at 5.

In addition, the last sentence of Section 3.1 of the MSA expressly gives PEC the authority to change rate schedules. Section 3.1 provides:

> 3.1 **Electric Service Supplied to Member**: The Cooperative will supply the electrical requirements of the Member that are not supplied by the QF. Such electric service shall be supplied under the rate schedules applicable to the Consumer's class of service as revised from time to time by the Cooperative. (Emphasis added.)

PEC's bylaws authorize its elected Board of Directors to implement rate schedules and revise them from time to time. The MSA does not prohibit PEC's Board from exercising its ratemaking authority, and in fact acknowledges that rate schedules may be changed.

Dairyland and its member distribution cooperatives (including PEC) have been leaders in implementing distributed generation. As of the end of 2014, 625 distributed generation facilities have been installed by members within the Dairyland system – a dramatic increase from the mere 44 such facilities operating in 2007. Additionally, among Dairyland's 25 distribution cooperatives, seven have built community solar projects, and nine more (including PEC) have such community solar projects under consideration. PEC, in cooperation with Tri-County Electric Cooperative and Freeborn-Mower Electric Cooperative ("MN – 3") constructed a 521 kW solar array located adjacent to PEC's Headquarters building in response to a Dairyland Request for Proposals. Accusatory statements addressing what some commenters may think about PEC's intent in implementing the $5.00 per month charge should not be given credence by the Commission.

CONCLUSION

For the reasons stated above, the Commission should decide that Minn. Stat. § 216B.164 permits PEC and other Minnesota electric cooperatives to recover, in addition to the revenue from net energy billing, to recoup the costs of serving a QF that are not recovered from net energy billing via a separate charge.

Dairyland appreciates the opportunity afforded by the Commission to file this response to the reply comments. Dairyland requests that the following persons be included on any service list in this proceeding:

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Dated this 16th day of July, 2015.

Respectfully submitted,

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