**STATE OF MINNESOTA**
**PUBLIC UTILITIES COMMISSION**

| | |
|---|---|
| Beverly Jones Heydinger | Chair |
| Nancy Lange | Commissioner |
| Dan Lipschultz | Commissioner |
| Matt Schuerger | Commissioner |
| John Tuma | Commissioner |

August 5th, 2016

**In the Matter of a Complaint of Larry Fagen against Minnesota Valley Cooperative Light & Power Association** — **Docket No. E-123/CG 16-241**

**COMMENTS IN RESPONSE TO THE COMMISSION'S MARCH 31, 2016 NOTICE BY FRESH ENERGY AND ENVIRONMENTAL LAW & POLICY CENTER**

Fresh Energy and the Environmental Law & Policy Center ("ELPC") submit these comments in response to the Commission's April 7, 2016 Notice of Comment Period regarding a customer dispute filed under Minn. Stat. § 216B.164, subd. 5 by Larry Fagen against his cooperative utility, Minnesota Valley Cooperative Light & Power Association ("Minnesota Valley"). Mr. Fagen alleges four claims that arise because Minnesota Valley denied Mr. Fagen the ability to retail rate net meter his on-site solar system that was expanded in early 2016. As a dispute filed under Minn. Stat. § 216B.164, subd. 5, the burden of proof in this matter rests squarely with Minnesota Valley to demonstrate that its actions are lawful.[1] Further, when interpreting any ambiguity in the statute, Minn. Stat. § 216B.164, subd. 1 directs that "[t]his section shall at all times be construed 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."

[1] Minn. Stat. § 216B.164, subd. 5 ("In the event of disputes between an electric utility and a qualifying facility, either party may request a determination of the issue by the commission. In any such determination, the burden of proof shall be on the utility." Emphasis added).

Minnesota Valley has not met its burden in this complaint proceeding. Instead, Minnesota's cogeneration and small power production statute is abundantly clear that Minnesota Valley's refusal to allow its customers to select retail rate net metering is not permitted. Therefore, Fresh Energy and ELPC respectfully recommend that the Commission find in favor of Mr. Fagen on his four claims and grant his requested relief.

## I. Minnesota's Small Power Production and Cogeneration Statute and Rules Require Cooperative Utilities to Offer Customer-Generators Three Compensation Options

Minnesota statutes and rules plainly establish that cooperative utilities must offer three different compensation options for customers with on-site cogeneration and small power systems under 40 kW, and that the choice of the three options rests with the customer-generator. Minn. Stat. § 216B.164, subd. 3(a) provides three compensation options for "net input into the utility system" by cooperative utility customers with systems under 40 kW. "Net input", often referred to as net-excess generation, is the amount of electricity produced by a customer's on-site system that exceeds the electricity consumed by that customer in a given month. Whether or not a customer produces net input depends on a customer's system's size, the system's output in a given month and the customer's monthly electricity use.

The statute provides three compensation options for a customer's net input, when it occurs: "[i]n the case of net input into the utility system by a qualifying facility having less than 40-kilowatt capacity, <u>compensation to the customer shall be at a per kilowatt-hour rate determined under paragraph (c), (d), or (f)</u>."[2] Those three options are: 1) compensation at the utility's federally-determined avoided cost rate [as described in paragraph (c)]; 2) retail rate net metering, which is compensation

[2] Minn. Stat. § 216B.164, subd. 3(a), emphasis added.

"at the average retail utility energy rate" [as described in paragraph (d)]; and 3) compensation in the form of a kilowatt-hour credit that is subtracted from the customer's energy use in future months rather than a monetary bill credit or check to the customer. These credits are carried forward until January 1 when they are canceled with no compensation [as described in paragraph (f)]. For all, or nearly all customers, retail rate net metering under option 2 makes the most economic sense.

In response to Mr. Fagen's complaint, Minnesota Valley states that for customers installing systems under 40 kW, its policy is to only allow customers the option to choose the avoided cost or kilowatt-hour credit options (options 1 and 3 above, respectively). In other words, the utility does not allow customers the option to be compensated under retail rate net metering. As it states, "[t]he Cooperative has affirmatively chosen to utilize the carry-forward compensation methodology for members installing new net metered systems after July 1, 2015" and that it is doing so "in lieu of seeking to recover the fixed costs not already paid for through net metering customers' existing billing arrangements were they to simply be paid out of pocket for all net input into the electric system at the Cooperative's average retail utility energy rate."[3]

Minnesota Valley argues that its decision to not offer Mr. Fagen the option for compensation under traditional retail rate net metering is lawful because "Minn. Stat. § 216B.164, subd. 3(a) does not provide that the customer has the unilateral right to elect which method of compensation to receive" for net input.[4] However, § 216B.164 and the rules implanting it are clear that the utility must offer all three compensation options and it is indeed the customer's option to choose among them.

[3] Minnesota Valley *Initial Response*, April 21, 2016 at 3-4.
[4] *Id.* at 4.

Minn. Stat. § 216B.164, subd. 3(a) states that for net input, "compensation shall be at a per kilowatt-hour rate determined under paragraph (c), (d), or, (f)."[5] This provision outlines the three options that must be available to cooperative utility customers. With the three compensation options established, by default it is either the customer or the utility that gets to choose which option is available to customers. The most reasonable interpretation of the statute is that it is the customer's choice. This interpretation is supported in that the statute and rules consistently establish that the choice between various compensation options rests with the customer. Meanwhile, nothing in the statute or rules suggests that the choice belongs to the utility.

Starting with the statute, the plain language of § 216B.164, subd. 3, paragraphs (d) and (f) – the two compensation options at issue here – both state that these compensation options are at the customer's election. Paragraph (d), the retail rate net metering option, states that "a qualifying facility[6] having less than 40-kilowatt capacity may elect that the compensation for net input by the quality facility into the utility system. . . ."[7] Likewise, paragraph (f), the kilowatt hour credit option, states that "[a] customer with a qualifying facility or net metered facility . . . may elect to be compensated for the customer's net input into the utility system. . ."[8]

Minnesota rules implementing these provisions are consistent that the choice between compensation options is the customer's.[9] Minn. R. 7835.3200 *Standard Rates for Purchases by Cooperative Electric Associations and Municipal Utilities from Qualifying Facilities* provides that cooperative utilities must offer customers with systems under 40 kW the option for retail rate net metering. It states that for

---

[5] Minn. Stat. § 216B.164, subd. 3(a), emphasis added.
[6] The statute uses the term "qualifying facility," which is synonymous with the customer who owns the qualifying facility.
[7] Minn. Stat. § 216B.164, subd. 3(d), emphasis added.
[8] Minn. Stat. § 216B.164, subd. 3(f), emphasis added.
[9] Although Minn. Stat. § 216B.164 was amended to include paragraph (f) after the adoption of the most recent Rules, the statute prior to the amendment had the same construction as it provided two compensation options and separated them with an "or". Prior to amendment, the statute read: "compensation shall be at a per kilowatt-hour rate determined under paragraph (c) or (d)." *See* 1Sp2015 c 1 art 3 s 21.

customers with systems under 100 kW (including systems under 40 kW), "[t]he utility must make available three types of standard rates" including the standard rate "described in part[] 7835.3300."[10] The standard rate described in Minn. R. part 7835.3300, entitled *Average Retail Utility Energy Rate*, is the retail rate net metering option. It states: "[w]hen the energy generated by the qualifying facility exceeds that supplied by the utility during a billing period, the utility must compensate the qualifying facility for the excess energy at the average retail utility energy rate." Therefore, together, Minn. Rs. 7835.3200 and 7835.3300 establish that cooperative utilities must offer customers the option to choose traditional retail rate net metering for their systems under 40 kW.

The Minnesota Uniform Statewide Contract Form in Minn. R. 7835.9910 is also consistent that the choice between compensation options rests with the customer, not the utility. The required contract form lists the three rate schedule categories for cooperative utilities set out in Minn. R. 7835.3200 (as described above) and explicitly states that "[t]he QF elects the rate schedule category hereinafter indicated."[11]

Further, all other provisions in 216B.164 or rules where a compensation choice is offered, the statute and rules are consistent that the choice is at customer's election.[12] Tellingly, there is no instance where statute or rules give the compensation option to utilities and, moreover, there is nothing in the 2015 amendment that suggests that the choice for compensation options has shifted to the utility.

---

[10] Emphasis added.
[11] Contract provision 2, emphasis added.
[12] *See e.g.*, Minn. Stat. § 216B.164, subd. 3(e) ("Qualifying facilities or net metered facilities . . . may, at the customer's option, elect to be governed by the provisions of subdivision 4." Emphasis added.); Minn. Stat. § 216B.164, subd. 3a ("a customer with a net metered facility . . . may elect to be compensated for the customer's net input into the utility system in the form of a kilowatt-hour credit . . ."); Minn. Rs. 7835.4011 and 7835.4012, subp. 1 ("A qualifying facility with less than 40 kilowatt capacity has the option to be compensated at the average retail utility energy rate . . ." Emphasis added.); Minn. R. 7835.4017, subp. 1 (A customer with a net metered facility can elect to be compensated for net input into the utility's system . . ."); Minn. R. 7835.4014, subp. 2.

For these reasons, the Commission should rule in favor of Mr. Fagen and find that 1) the compensation options under Minn. Stat. § 216B.164, subd. 3 are at the customer's election; and 2) that Minnesota Valley has not met its burden demonstrating that its refusal to not offer retail rate net metering is lawful.

## II. Other Issues Raised by the Commission's Notice

*Is it permissible for a utility to waive or reduce other fees to encourage QFs to elect a specific method of compensation for excess energy, such as the kWh carry forward method?*

It is only permissible for a utility to waive or reduce fees, or offer other incentives, to encourage a QF to elect a specific method of excess energy compensation if the utility is doing so in a way that otherwise complies with statutes and rules. In this way, utilities could only offer to waive fees that are otherwise lawfully in place, and could only do so as encouragement to select a compensation option, but not in lieu of offering a required customer option. Here, the fee Minnesota Valley suggests it is waiving in favor of the kWh carry forward method has not been established as lawful. Instead, Minnesota Valley only offers that it has the ability to offer the fee that it has not put in place, that is currently being challenged and has not been reviewed or approved by the Commission. Moreover, it is doing so in lieu of offering its customers compensation options the utility is legally required to offer.

To the extent the Commission reaches this question, we recommend that it find that any "encouragement" is limited to waiving otherwise permissible fees and/or requirements and that all required compensation options are still available to customers.

*If a customer installed a solar system prior to July 1, 2015 and expanded it after July 1, 2015, is all, part, or none of the combined system subject to the 2015 amendments to Minn. Stat. § 216B.164?*

Fresh Energy and ELPC agree with Mr. Fagen's contention that the Commission should interpret the 2015 amendment's effective date language to apply only to new systems, not expanded systems. At a minimum, the Commission should find that the 2015 amendments do not apply to any system capacity installed prior to July 1, 2015. Retroactive application of the 2015 amendments would not only penalize customers who installed systems prior to those amendments, but allowing such retroactive policymaking undermines the stability and confidence that the industry and customers need to support investment in Minnesota

## III. Recommendations

Fresh Energy and ELPC respectfully recommends that the Commission:

1. Rule in favor of Mr. Fagen on all claims;
2. Order that the compensation options under Minn. Stat. § 216B.164, subd. 3 are at the customer's election, not the utility's;
3. Find that Minnesota Valley has not carried its burden to show that Minn. Stat. 216B.164 and concurrent Minnesota rules allow it to restrict customer generator (or "QF") compensation options established in the statute and rules;
4. Grant the relief requested by Mr. Fagen;
5. Order that Minnesota Valley submit a compliance filing within 30 days of the Order demonstrating that its tariff allows customers the option to select all compensation options under Minn. Stat. § 216B.164, subd. 3; and
6. Order that i) Mr. Fagen submit an invoice including all costs, disbursements, and reasonable attorney's fees related to this dispute to Minnesota Valley; and ii) that Minnesota Valley submit a compliance filing within 30 days of the Order demonstrating that it has made payment to Mr. Fagen covering his costs, disbursements, and reasonable attorneys' fees related to this dispute.

/s/ *Allen Gleckner*
Allen Gleckner
Director, Energy Markets
Fresh Energy
408 St. Peter Street, Suite 220
St. Paul, MN 55102
(651) 726-7570
gleckner@fresh-energy.org

/s/ *Brad Klein*
Brad Klein
Senior Attorney
Environmental Law & Policy Center
35 E Wacker Drive, suite 1600
Chicago, IL 60601
(312) 795-3746
bklein@elpc.org