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May 22, 2017

Filed via E-Dockets

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101-2147

RE: In the Matter of a Commission Inquiry into the Creation of a Commission Subcommittee under Minn. Stat. §216A.03, subd. 8.
DKT. E999/CI-17-284

Dear Mr. Wolf,

Enclosed for filing in the above referenced docket, please find the comments of Missouri River Energy Services in response to the Commission's "Notice of Comment Period on Possible Distributed Generation Subcommittee under Minn. Stat. §216A.03, subd. 8" issued April 17, 2017. Also enclosed is an Affidavit of Service.

Please contact me at 800.678.4042 or by email at derek.bertsch@mrenergy.com if you have any questions regarding this filing.

Sincerely,

/s/ Derek Bertsch

Derek Bertsch
Staff Attorney

Enc.

c: Service List via E-Filing and U.S. Mail

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange
Dan Lipschultz
Matt Schuerger
Katie Sieben
John Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Inquiry
into the Creation of a Commission
Subcommittee under Minn. Stat. §216A.03,
subd. 8.

Docket E999/CI-17-284

Date: May 22, 2017

COMMENTS OF
MISSOURI RIVER ENERGY SERVICES

Introduction

Missouri Basin Municipal Power Agency, d/b/a Missouri River Energy Services (“MRES”), offers these comments in response to the Notice of Comment Period on Possible Distributed Generation Subcommittee Under Minn. Stat. §216A.03, Subd. 8, issued by the Minnesota Public Utilities Commission (Commission) on April 17, 2017.

MRES is a not-for-profit municipal power agency that provides wholesale power, energy, transmission, and energy services to its 60 Member municipal utilities in the states of Iowa, Minnesota, North Dakota, and South Dakota. MRES was created by the municipalities it serves as a means to jointly provide power supply and transmission to meet the needs of their growing communities. The 24 Minnesota Members of MRES are generally rural and residential.¹ The Minnesota Members are located primarily in western Minnesota, and range in size from a population just over 700 in Westbrook to our largest MRES community, Moorhead, with a population approaching 40,000. The Minnesota Members of MRES serve a total population base of about 80,000.

These comments are offered on behalf of both MRES and our 24 Minnesota Member municipal electric utilities in response to the topics open for comment identified in the Notice.

¹ The Minnesota Members of MRES are the municipal electric utilities of Adrian, Alexandria, Barnesville, Benson, Breckenridge, Detroit Lakes, Elbow Lake, Henning, Hutchinson, Jackson, Lakefield, Lake Park, Luverne, Madison, Marshall, Melrose, Moorhead, Ortonville, Saint James, Sauk Centre, Staples, Wadena, Westbrook, and Worthington.

Comments

MRES acknowledges the Commission's authority to create Commission Subcommittees to which the Commission may then delegate "any of the commission's legislative, administrative, or quasi-judicial functions. . . ." ² In this instance, however, MRES has serious concerns with the proposed delegation of Commission functions regarding distributed generation ("DG"). In general, MRES is open to consideration of more efficient methods to address and resolve matters related to DG. Such methods could include the possible creation of a Commission Subcommittee. Any method used to address and resolve DG matters must be clear as to (1) scope of the subcommittee delegation, (2) delineation of DG matters eligible for subcommittee referral, and (3) safeguards to prevent abuse of the new subcommittee process.

In addition, MRES is unconvinced that a DG subcommittee is necessary and would result in the Commission functioning more efficiently. The Notice does not indicate that customers, utilities, or any other interested parties have proposed or requested the Commission establish a DG subcommittee. Apart from Commission staff's concerns over delays or inability to provide definite answers, it does not appear the proposed DG subcommittee is essential at this time. Indeed, under the terms of § 216A.03, subd. 8, parties and participants will still be able to bypass the subcommittee process, either initially or through ultimate appeal. In addition, if a party or participant files an objection to the subcommittee's decision, the full Commission would essentially engage in a fresh analysis of the record. These statutory realities raise concerns that the proposed subcommittee will ultimately only lead to further delays and administrative procedure. This would only exacerbate the issues identified in the Staff Proposal regarding time invested by Commission staff, utilities, and customers to address DG-related questions and complaints.

It is difficult to determine the specifics regarding the proposed work and process that Commission staff intends for any potential DG subcommittee. The Staff Proposal lays out a cursory summary titled "Anticipated Type of Subcommittee Work," but the three bullet points are very general. A great deal more clarification is needed to allow utilities, customers, and other interested parties to evaluate the true intent of the possible subcommittee. A list of possible policy issues to be diverted to the subcommittee is provided, but these are again very broad. The process for subcommittee activity, moreover, is given very little explanation.

MRES may have proposals as to other types of issues that could be handled by the DG subcommittee. However, the current list of possible DG issues is too general and non-specific to allow a full analysis of the various issues that should be referred to the subcommittee. Assuming a DG subcommittee is created, MRES could support the subcommittee addressing and resolving common DG issues that the full Commission has considered previously. In other words, the DG subcommittee should only be used in similar instances for which there is settled authority from the Commission.

² Minn. Stat. § 216A.03, subd. 8(a).

- I. Should the Commission establish a subcommittee as outlined in Attachment A that would more quickly move issues forward that are raised in customer complaints or other filings at the Commission?

- A. The Subcommittee Process May Increase Delay and Administrative Burden

The Notice seems to assume the proposed DG subcommittee would more quickly move issues forward that are raised in customer complaints or other filings at the Commission. There is, however, a strong possibility the subcommittee process will further burden the Commission, staff, customers, utilities, and others. The DG subcommittee would be a new layer of administrative process but would not eliminate any existing layers. Under Minn. Stat. § 216A.03, subd. 8, parties and participants would retain their (1) right to have their matter heard by the full Commission at the outset, and (2) right to appeal from a subcommittee decision to the full Commission.³ Thus, parties and participants would have the statutory right to bypass the DG subcommittee entirely to have their matter heard by the full Commission. Even if the DG subcommittee issued a definitive decision or advice, it would be subject to appeal to the full Commission. In such cases, the Commission would still have to decide the matter even after the DG subcommittee invested time and resources beforehand. On appeal, moreover, the Commission would have to make its own decision regarding any matters decided by the DG subcommittee.⁴

What rules of administrative procedure would apply to matters referred to the DG subcommittee? The Staff Proposal makes it clear the “delegation would include varying the Commission’s Rules of Practice and Procedure in Minnesota Rules 7829 as appropriate for record development.”⁵ The only example given, however, is “the subcommittee may decide to shorten comment periods for certain narrow or undisputed items.”⁶ It is impossible to determine whether the DG subcommittee process will be shorter or otherwise more efficient without knowing the applicable rules that would apply or be amended. In addition, customers, utilities, and others have no way to know at this time whether the DG subcommittee process will be preferable in any way to simply having these matters decided by the full Commission.

Rather than saving time and resources, the DG subcommittee would potentially exacerbate the concerns raised in the Staff Proposal. There is nothing in the Staff Proposal to indicate utilities, customers, or others have requested some process to expedite or streamline DG issues before the Commission. With this in mind, and the potential for increased delay and administrative burden, MRES would caution against adoption of the possible DG subcommittee.

³ Minn. Stat. § 216A.03, subd. 8(b) & (c).

⁴ “If referred to the full commission, the full commission may rely on the record developed by the subcommittee but shall treat the subcommittee decision as advisory.” Minn. Stat. § 216A.03, subd. 8(b).

⁵ Staff Proposal, page 3.

⁶ *Id.*

B. Scope of Docket Should be Limited

Delegation of the Commission's administrative and quasi-judicial functions, while permitted by statute, is a significant action.⁷ These powers of the Commission, granted by the Legislature, should not be delegated without a great level of detail as to the new administrative structure. The Staff Proposal provides very little detail to allow customers, utilities, and others to effectively comment on the specifics of the plan.

First, MRES and other utilities need to know the scope of the subcommittee delegation. The Notice and Staff Proposal contain only a general description of functions to be delegated to the proposed DG subcommittee.⁸ This summary is very broad and contains numerous subjective qualifications for a matter to be referred to the subcommittee.

1. What specific administrative functions will be delegated?
2. What specific quasi-judicial functions will be delegated?
3. How would the subcommittee engage in record development?
4. What statutory or administrative rules would govern record development by the subcommittee?
5. Would the subcommittee have the authority to alter rules of administrative procedures such as deadlines?
6. Would the subcommittee have the authority to interpret statutes, rules, orders, and tariffs?
7. How can a subcommittee, as opposed to the full Commission, validly interpret statutes passed by the Legislature?
8. How would the Commission and the DG subcommittee decide whether statutes, rules, orders, or tariffs can be "easily interpreted"?
9. What is the effect of a DG subcommittee decision?
10. What are the standards for determining whether a DG subcommittee decision is "short" for purposes of the new process?

These questions, and many more, should be answered before public comments on the Notice and Staff Proposal are solicited. With any delegation of Commission functions, the scope of the delegation should be clearly stated and limited.

Second, full evaluation and comment on the current proposal requires delineation of DG matters eligible for subcommittee referral. The Notice discusses customer complaints and formal filings on DG issues, but the Staff Proposal seems to indicate the proposed DG subcommittee

⁷ The Commission's quasi-judicial function "means the promulgation of all orders and directives of particular applicability governing the conduct of the regulated persons or businesses, together with procedures inherently judicial." Minn. Stat. § 216A.02, subd. 4. The administrative function "means all duties and procedures concerning the execution and enforcement of the laws, rules, orders, directives, duties, and obligations imposed for the control and government of the persons or businesses regulated, together with investigative activities incident thereto and procedures inherently administrative or executive in character." Minn. Stat. § 216A.02, subd. 3.

⁸ "Staff expects the Commission would delegate to the Subcommittee its administrative and quasi-judicial functions to provide record development, set deadlines, and in cases where statute, rule, order, or tariff can be easily interpreted, issue short decisions." Staff Proposal, page 3.

would not handle every DG matter.⁹ Indeed, the Staff Proposal includes a section entitled “Anticipated Type of Subcommittee Work,” which delineate several broad categories to be assigned to the subcommittee. These categories, however, are not exclusive but rather stated to be “examples of possible work” to be delegated to the DG subcommittee. Indeed, Commission staff suggests there be flexibility in referring appropriate disputes to the subcommittee. In other words, the type of matters to be referred to the DG subcommittee is wholly unknown at this time.

Finally, the Staff Proposal does not stipulate any safeguards to prevent abuse of the new subcommittee process. MRES has outlined above the serious risk that the DG subcommittee process would create further delay and inefficiencies in these matters. Matters before the full Commission are subject to a host of statutory and regulatory rules governing procedure, due process, and rights of parties and participants. As written, the Staff Proposal does not indicate whether and to what extent these or any other protections would extend to the proposed DG subcommittee. The Staff Proposal does highlight the language of § 216A.03, subd. 8(b) and (c), which guarantees rights of Commission consideration and appeal. If these are the safeguards to parties and participants, however, it raises the question of why the subcommittee is necessary. If parties and participants are protected via resort to the full Commission, why impose a subcommittee process? As to the appeal right, moreover, parties appealing to the full Commission would be burdened with an advisory decision from the subcommittee.

As written, neither MRES nor any other utility can effectively comment on the Notice and Staff Proposal for the DG subcommittee. Much more detail is necessary regarding the type of work that would be referred to the subcommittee and the limits of the subcommittee’s delegated authority. Even where limits are stated, they are very broad and described as non-exclusive or “flexible.”

C. The Subcommittee Should Only Consider Matters on Settled Questions

As stated above, MRES has substantial questions on whether the proposed DG subcommittee should be implemented. If the Commission moves forward with creating a DG subcommittee, however, MRES proposes the scope of referred matters be limited to common DG issues that have been addressed previously by the Commission in similar instances and for which there is settled authority from the Commission. In this way, the delegation of authority to the DG subcommittee would be appropriately limited. Parties and participants would also have critical safeguards in place since the DG subcommittee would have clear Commission authority upon which to issue decisions. This authoritative guidance would provide guardrails to any action by the subcommittee within the streamlined process for DG matters. In this way, utilities, customers, and other affected parties would have important clarity on the applicable law before deciding whether to utilize the DG subcommittee process.

If the Commission grants quasi-judicial authority beyond these settled areas, it will create harmful uncertainty for parties and participants. The confusion would be worsened by the disparity between DG matters decided by the full Commission versus the DG subcommittee. In response, parties will be inclined to request consideration by the full Commission, either initially or on a subsequent appeal from the subcommittee. This will cause further delay in getting a final

⁹ *Id.*

resolution on the issues raised. These DG matters should remain with the full Commission for these reasons. If a DG subcommittee is created, though, the delegation of quasi-judicial functions should only extend to areas in which the Commission's established precedent is clear.

II. Is the Intention and Proposed Process for the Subcommittee Reasonable?

As discussed above, there is a great deal of uncertainty in the scope and other specifics of the proposed DG subcommittee. This makes it difficult to evaluate the intent of the proposal and the process to be implemented. However, MRES offers specific comments on the sample plan elements outlined in the Staff Proposal. The following are responses to the examples given in the section of the Staff Proposal entitled "Anticipated Type of Subcommittee Work." These are examples of the types of DG matters Commission staff anticipates the Commission would refer to the proposed DG subcommittee.

A. Complaints filed with the Consumer Affairs Office or filed in formal dockets where it is fairly clear that a non-violation or a violation exists.

This type of matter, as described, raises a number of serious issues and questions. For example, how will the Commission, its staff, or the DG subcommittee determine whether a violation is "fairly clear" in a given matter? What is "fairly clear" to one decision-maker may not be to another. Perhaps more troubling, this "fairly clear" standard seems to presume the outcome of the matter before there is anything other than an initial filing. These issues raise a host of important questions as the Commission decides whether to refer a matter to the DG subcommittee. Who will make the determination whether it is "fairly clear" that a violation has or has not occurred? Will that person or body assume the facts alleged in the initial filing are true? How will the pertinent person or body make the "fairly clear" determination? What are the due process implications of this "fairly clear" determination?

B. Undisputed DG filings that would benefit from streamlined approval.

It is unclear from the Staff Proposal what would qualify as an "undisputed DG filing." As with Item A above, it is not stated who would make the determination of whether a matter is "undisputed" and how that determination would be made. If a matter is "undisputed," why would it need to go to the DG subcommittee at all? The process for resolution would be straightforward, with the Commission simply issuing some type of summary ruling. With no dispute as to the filing, and no adverse parties or participants, arguably no subcommittee process would be necessary. Regardless, stakeholders need additional information regarding the categories and volume of such undisputed filings.

C. Instances where high-level policy issues do not need to be decided, and where clarity to the broader utility/customer community would be useful. Priority would be given to disputes that have come up repeatedly and are affecting multiple parties.

This item has a number of stated examples, but the heading stated here should be addressed directly. The stated examples (1-6) will be addressed below. As an overarching

question, how will the Commission distinguish between “high-level policy issues” and all other issues? What person or body will make this determination? What specific DG issues qualify as “high-level” versus those that will be referred to the DG subcommittee? Why are those issues denoted as “high-level” and therefore inappropriate for decision by the DG subcommittee? Will the determination of “high-level policy issues” be made based solely on the information in the initial filing(s)?¹⁰ These are only a few questions raised by this “high-level policy issues” standard.

The Staff Proposal suggests prioritization of those matters “where clarity to the broader utility/customer community would be useful.”¹¹ Who will determine whether a lack of clarity exists on any issue? Such determinations are generally made by the Commission. In a specific DG matter, how and by whom will the determination of clarity be made? The Staff Proposal itself seems to support limiting the scope of the delegation by providing that, “Priority would be given to disputes that have come up repeatedly and are affecting multiple parties.”¹² Ultimately, these questions and the Staff Proposal support limiting the scope of the DG subcommittee’s authority to issues that have been addressed previously by the Commission in similar instances and for which there is settled Commission authority.

D. Possible examples of disputes for referral to the DG subcommittee.

- 1) Interpretation of Minn. Stat. § 216B.164, 216B.1611, or related statutes, for example, individual capacity system limits in Minn. Stat. § 216B.164, subd. 4c, or where there is a specific situation that statute, rule or tariff does not address.

The Commission should not delegate its quasi-judicial function of interpreting statutes passed by the Legislature. If a statute requires interpretation, it is not “fairly clear” or otherwise suited to a decision by a subcommittee that includes laypersons who are not on the Commission. Delegating to the DG subcommittee the function of statutory interpretation elevates that body to the level of the Commission. In the absence of clear authority from the Legislature or the Commission, such issues should be addressed and decided only by the full Commission.

- 2) Customers on dual fuel or time of use customers who are unable to stay on those special rates while receiving net metering.

Net metering issues are notoriously controversial. While DG issues may cross over into net metering matters, the Legislature and the Commission have adopted their own separate authority governing net metering. Delegating net metering issues to a subcommittee risks undermining these separate statutory and regulatory structures and precedents. The DG subcommittee may attempt to implement its own interpretations of statutes, rules, and tariffs.

¹⁰ It would be very difficult, if not impossible, to determine whether a DG matter deals with any “high-level policy issues” based solely on the initial filings. This is especially true if the determination is made immediately upon the filing by the first party, without the benefit of any responsive filings from the other side. In some cases, the existence of any “high-level policy issues” is not revealed until long after the initial filings.

¹¹ Staff Proposal, page 3.

¹² *Id.*

This is especially true of tariffs over which the Commission does not have jurisdiction, such as municipal tariffs. Consistency of statutory and regulatory authority is crucial for utilities and customers alike, and conflicting interpretations of preexisting law will jeopardize such consistency. The Commission is and should remain the ultimate arbiter of any separate, “high-level policy issues” like net metering.

- 3) Approval of deviations from the uniform statewide contract, under Minnesota Rules 7835.9920.

It is our understanding the Commission has received few, if any, requests for approval of deviations from the uniform statewide contract. Such issues should continue to be handled exclusively by the full Commission until there is a greater body of settled decisions from the Commission as to what are considered acceptable versus unacceptable deviations from the uniform statewide form of contract. As discussed above, the proposed DG subcommittee should not be delegated legislative, administrative, or quasi-judicial functions where there is a vacuum of authority from the Legislature or the Commission.

- 4) Interconnection costs or requirements for systems under 40 kilowatts (kW).

The proposed DG subcommittee should not be delegated legislative, administrative, or quasi-judicial functions where there is a vacuum of authority from the Legislature or the Commission. If the proposed subcommittee is delegated authority to make rulings in such situations, there is a risk of conflict with or bypassing of actual legislation addressing DG under 40 kilowatts. As the Commission and its staff appear to understand, high-level policy issues like these should continue to be the sole province of the full Commission to which the Legislature has statutorily delegated legislative, administrative, and quasi-judicial authority.

- 5) Calculations of average retail rates under Minnesota Rules 7835.1400 and related statutes, rules, and orders.

The calculations under Minnesota Rules 7835.1400 are inappropriate for delegation by the Commission. This calculation is the subject of countless contested cases in jurisdictions throughout the United States, at the state and federal levels. The Staff Proposal should define with more precision the specific situations that would be delegated to the DG subcommittee, as well as the components of average retail rates the subcommittee could handle more expeditiously than a proceeding before the full Commission. In the event one of these calculations is challenged, it would lead to further delay and confusion given the extra layer of administrative procedure created by the DG subcommittee. MRES and other utilities need certainty and established procedure when working with these calculations. The proposed subcommittee process will detract from this certainty and create additional confusion of these DG matters.

- 6) Clarification of filing requirements under 7835.0300-.1800 and related rules, statutes, and orders.

Based on current practices of the Commission and its staff, clarifications of filing requirements are currently delegated to the Commission's Executive Secretary. It is unclear why this item must be delegated to the DG subcommittee when it is already the prerogative of the Executive Secretary. Further clarification of the purpose and scope of this delegation should be provided to stakeholders.

III. Are there other examples of issues that could be handled by the subcommittee?

As discussed in the previous sections, MRES is unconvinced that a new subcommittee is necessary or proper at this time to more quickly resolve or provide clarification for DG issues. In addition, the Notice and Staff Proposal are too ambiguous and general to allow proper comment by utilities, customers, and others. If a DG subcommittee is created, MRES urges that any delegation by the Commission be limited to those issues on which the Commission has previously decided similar matters and for which there is established precedent. In this way, the DG subcommittee would have settled authority to apply when deciding issues on DG. In addition, utilities and their customers would have safeguards in matters before the subcommittee in the form of clear authority from the Commission, as the ultimate arbiter of the statutes, regulations, and orders of the Commission.

Conclusion

The proposed DG subcommittee, as described in the Notice and Staff Proposal, would create troubling uncertainty for utilities and their customers. The Staff Proposal raises numerous large questions due to its ambiguity and incompleteness. As a threshold matter, it is not clear a subcommittee process is necessary or would accomplish the stated goal of streamlining DG issues. It appears the new subcommittee process may only worsen the administrative burden on stakeholders by creating redundant and unnecessary regulatory procedures. Before stakeholders can effectively offer comments on the Staff Proposal, however, a great deal of clarification is necessary. As presented, it is impossible for MRES and other stakeholders to respond due to the lack of concrete specifics on the intent, scope, processes, and safeguards of the proposed DG subcommittee.

If the Commission moves forward with a DG subcommittee, despite all of the concerns above, MRES recommends the scope of the delegation to the DG subcommittee be clearly stated and limited. The DG subcommittee should only be delegated authority where the regulatory field is well settled, preserving the Commission as the ultimate rule maker for DG and related issues. This would mean the subcommittee would only have authority over those DG issues that have been addressed by the Commission in similar instances and for which there is pertinent settled precedent. This scope of authority for the subcommittee could lessen the procedural burden on the full Commission while still protecting stakeholders with authoritative guardrails.

Dated: May 22, 2017

Respectfully submitted,

MISSOURI RIVER ENERGY SERVICES

/s/ *Derek Bertsch*

By: Derek Bertsch
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**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

Nancy Lange	Chair
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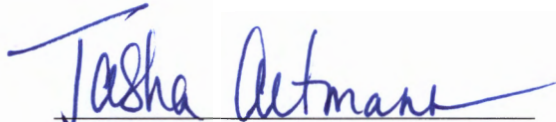
**COMMENTS OF MISSOURI RIVER
ENERGY SERVICES**

AFFIDAVIT OF SERVICE


STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF LINCOLN)

I, Tasha Altmann, being first duly sworn, depose and state that on the 22 day of May, 2017, I filed and served a true and correct copy of the **COMMENTS OF MISSOURI RIVER ENERGY SERVICES**, on behalf of Missouri River Energy Services, by electronic filing, to the Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, MN, 55101-2147, via the E-Dockets filing system, and to each person identified on the attached service list by email, or where not served by email, I have served a true and correct copy thereof by depositing the same in the US Mail at Sioux Falls, South Dakota.




Tasha Altmann

Subscribed and sworn to before me this 22nd day of May, 2017



Derek Bertsch
My commission expires: 4/6/18