MINNESOTA SOLAR ENERGY INDUSTRIES PROJECT

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March 17, 2016

Mr. Daniel Wolf, Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: *Larry Fagen, Qualifying Facility, v. Minnesota Valley Electrical Cooperative*

Dear Mr. Wolf:

Enclosed for e-filing please find the Verified Complaint of Larry Fagen, Qualifying Facility, against Minnesota Valley Electrical Cooperative under Minnesota Statute 216B.164, subdivision 5.

Copies of this filing have been served on the Respondent, the Minnesota Department of Commerce and the Minnesota Office of Attorney General – Residential Utilities Division, as required by Minn. Rule 7829.1700.

Very truly yours,

David Shaffer, esq., representing Larry Fagen, Qualifying Facility
Minnesota Solar Energy Industries Project

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Complaint

&

Customer/Attorney Public Representation Agreement

Enclosed

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
John Tuma	Commissioner
Nancy Lange	Commissioner
Daniel Lipschultz	Commissioner
Matthew Schuerger	Commissioner

INTRODUCTION

Approximately one year, ago several installer members of the Minnesota Solar Energy Industries Association (MnSEIA) brought to the attention of MnSEIA staff that several utilities across the state were acting in ways that are contrary to Minn. Stat. § 216B.164 and other state statutes or rules. After a preliminary analysis of the applicable statutes, MnSEIA determined that the best way to correct utility misconduct was to form a new, separate and distinct, sister organization called the Minnesota Solar Energy Industries Project (MnSEIP). Along with housing other programs, MnSEIP acts as a non-profit law firm that represents Qualifying Facilities (QF) in disputes with their utility.

Today MnSEIP is working on behalf of the QF (Larry Fagen), the owner of an 18.2kW solar array in Minnesota Valley Electric Cooperative's ("MN Valley" or the "utility") service territory. Larry's solar array is a QF pursuant to PURPA and Minn. Stat. § 216B.164. Larry is requesting a dispute resolution proceeding in accordance with Minn. Stat. § 216B.164, subd. 5.

The object of this dispute resolution proceeding is to ensure that Larry's QF is treated fairly under the law, and that his solar array is not required to automatically enter Minn. Stat. 216B.164, subd. 3(f)'s "roll-over" program. But Larry also files this claim as a protective measure against future utility retaliation, which was hinted at by MN Valley representative Bob Walsh on or around January 20, 2016. So Larry seeks to enjoin the utility from imposing a fee for fixed costs on his system.

JURISDICTION

The Minnesota Public Utilities Commission (the "Commission") has jurisdiction over this dispute under Minn. Stat. § 216B.164, subd. 2 and reaffirmed in Docket No. E-132/CG-15-255.[1]

[1] *See* ORDER FINDING JURSIDCITION AND RESOLVING DISPUTE IN FAVOR OF COMPLAINANT, MINNESOTA PUBLIC UTILITIES COMMISSION, Docket No. E-132/CG-15-255, Doc. ID. 20159-114134-01 at 7 (Sept. 21, 2015) (stating "The Commission finds that it has jurisdiction over this matter").

PARTIES

Larry is located at 15236 880th Ave, Sacred Heart, MN. The utility is located at 501 1st St. S Montevideo MN 56265.

REPRESENTATION & COMMUNICATIONS

The attorney representing Keith is David Shaffer who is located at 2952 Beechwood Ave. Wayzata MN 55391. All communications relevant to this dispute should be directed to him:

David Shaffer, esq.
Staff Attorney
Minnesota Solar Energy Industries Project
2952 Beechwood Ave.
Wayzata MN 55391

Phone: 612-849-0231
Email:shaff081@gmail.com

FACTS

In December of 2012, Larry had Green Energy Products install a 9.156kW system. He asked the installers to build the system so that he could later add onto it.[2] Green Energy Products set up additional piping to make a future expansion easier.[3]

On June 13, 2015, the Minnesota Legislature passed, and the Governor signed, an amendment to Minn. Stat. § 216B.164, which reads in pertinent part:

> 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), (d), or (f).
>
> […]
>
> (f) A customer with a qualifying facility or net metered facility having a capacity below 40 kilowatts that is interconnected to a cooperative electric association or a municipal utility may elect to be compensated for the customer's net input into the utility system in the form of a kilowatt-hour credit on the customer's energy bill carried forward and applied to subsequent energy bills. Any kilowatt-hour credits carried forward by the customer cancel at the end of the calendar year with no additional compensation.
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> […]

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2 *See* APPENDIX B, Affidavit of Larry Fagen Regarding Dispute with Minnesota Valley Cooperative at ¶1 (Mar. 15, 2016) [hereinafter *Larry Affidavit*]; *See also* APPENDIX B, Affidavit of Philip Lipetzky at ¶1 (March 9, 2016) [hereinafter *Philip Affidavit*].

3 *See Philip Affidavit* at ¶2, *supra* note 2.

> This section is effective July 1, 2015, and applies to customers installing net metered systems after that day. [4]

In November of 2015, Larry contacted Green Energy Products again, asking that they install an additional 9.156kW onto his pre-existing system.[5]

On January 4, 2016, Larry had his solar array installed on his building site.[6]

On January 15, 2016, MN Valley installed their new production meter, at which time they simultaneously began tracking both the old and new arrays on the same meter and they left their uniform state-wide contract with Larry.[7]

Larry then sent the contract to Green Energy Products for inspection. MN Valley's contract did not give Larry the option to receive any credit for excess generation under Minn. Stat. § 216B.164, subd. 3(c) or (d). Instead, the only option available was the option listed under Minn. Stat. § 216B.164, subd. 3(f), and the line next to this option already contained an "X" filled in on the contract.[8]

Larry did not sign the contract for approximately three or four days, and then MN Valley's representative, Bob Walsh, started calling Larry, requesting he sign the contract and send it back in. Bob called Larry for four or five days in a row. [9]

On or around January, 20, 2016, instead of signing the contract, Larry decided to have a conversation with Bob. He asked about other options for crediting excess generation. The response Bob gave is that if Larry wanted to go any other option, then Larry would be subject to "$650" annual fee for his 18.2kW system. Bob told Larry there are "really no other options," and that "this is the way the board decided to do it." Bob did not explain the basis for the $650 fee.[10]

In that same conversation, Bob also informed Larry that if he did not sign the contract, then he would forfeit his excess energy generated in January. Larry then asked Bob about the $200 January bill and whether excess generation in the summer could cover the lack of production for

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4 Minn. Stat. 216B.164, subd. 3(f).

5 *See Larry Affidavit* at ¶4, *supra* note 2; *See also Philip Affidavit* at ¶3, *supra* note 2.

6 *See Larry Affidavit* at ¶5, *supra* note 2; *See also Philip Affidavit* at ¶6, *supra* note 2.

7 *See Larry Affidavit* at ¶7, *supra* note 2; *See also Philip Affidavit* at ¶8, supra note 2.

8 *See Larry Affidavit* at ¶7, *supra* note 2; *See also* APPENDIX A.

9 *See Id*. at ¶8.

10 *See Id*. at ¶9.

the winter months. Bob informed Larry that he would forfeit the excess energy at the end of the year and it would not cover early months where generation was low.[11]

On February, 2, 2016, Larry signed the contract.[12]

BURDEN OF PROOF

In accordance with Minn. Stat. § 216B.164, subd. 5 and Minn. Rule 7835.4500 the burden of proof in this dispute is on the utility.[13]

CLAIM I

Through the above actions MN Valley has violated the Larry's rights to elect to receive compensation for his excess generation, according to Minn. Stat. § 216B.164, subd. (c) and (d), Minn. Rule 7835.4012, subpart 1.

Minn. Stat. § 216B.164, subd. 3(a) states 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. 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), (d), or (f).*[14]

This section articulates that the per kilowatt-hour rate can be one of the three paragraphs below. Those paragraphs are listed here:

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11 *See Id*. at ¶10-11.

12 *See Id*. at ¶12.

13 Minn. Stat. 216B.164, subd. 5; Minn. Rule 7835.4500 (stating "[i]n any such determination, the burden of proof shall be on the utility.").

14 Minn. Stat. § 216B.164, subd. 3(a) (emphasis added).

> c) In 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. The commission shall set the rates for net input into the utility system based on avoided costs as defined in the Code of Federal Regulations, title 18, section 292.101, paragraph (b)(6), the factors listed in Code of Federal Regulations, title 18, section 292.304, and all other relevant factors.
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> d) Notwithstanding any provision in this chapter to the contrary, a qualifying facility having less than 40-kilowatt capacity *may elect* that the compensation for net input by the qualifying facility into the utility system shall be at the average retail utility energy rate. "Average retail utility energy rate" is defined as the average of the retail energy rates, exclusive of special rates based on income, age, or energy conservation, according to the applicable rate schedule of the utility for sales to that class of customer.
>
> […]
>
> (f) *A customer with a qualifying facility or net metered facility* having a capacity below 40 kilowatts that is interconnected to a cooperative electric association or a municipal utility *may elect* to be compensated for the customer's net input into the utility system in the form of a kilowatt-hour credit on the customer's energy bill carried forward and applied to subsequent energy bills. Any kilowatt-hour credits carried forward by the customer cancel at the end of the calendar year with no additional compensation.[15]

The above paragraphs illustrate that the party that chooses the compensation option for excess net input into the system is not the utility, but is instead the customer who owns the qualifying facility. After all, subdivision 3(a) uses the word "or," subdivision 3(d) says "the qualifying facility… may elect," and subdivision 3(f) also says "a customer with a qualifying facility or net metered facility … may elect." The statute clearly places the choice in the hands of the customer.

Contrary to the statute, MN Valley's contract did not provide the customer with any opportunity to choose between the three options for excess generation. In addition to this, when Larry inquired into whether other options were available the utility threatened to apply "a large fee" to any other billing arrangement and that he would be unable to receive any credit for his system's first month of generation.

In addition to Minn. Stat. 216B.164, the same customer election element is embedded in Minn. Rule 7835.4012, subpart 1, which states the following:

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[15] Minn. Stat. § 216B.164, subd. 3(c), (d), and (f) (emphasis added).

Facilities with less than 40 kilowatt capacity.

A qualifying facility with less than 40 kilowatt capacity *has the option* to be compensated at the average retail utility energy rate, the simultaneous purchase and sale billing rate, or the time-of-day billing rate.[16]

This language illustrates that the Commission has historically interpreted Minn. Stat. § 216B.164 to include a customer election, because the Commission created this law in response to the original legislation. Larry should not be automatically entered into the rollover program, and should instead, be given the option to select any method of payment of his excess generation that is plainly an option under the statute.

CLAIM II

By supplying an altered contract MN Valley has violated the QF's right to receive the statewide contract, pursuant to Minn. Stat. § 216B.164, subd. 6 (c), as well as Minn. Rules 7350.6100, 7350.9910 and 7835.9920.

Minn. Stat. § 216B.164, subd. 6 (c) reads as follows:

> The uniform statewide form of contract shall be applied to all new and existing interconnections established between a utility and a net metered or qualifying facility having less than 40-kilowatt capacity, except that existing contracts may remain in force until terminated by mutual agreement between both parties.[17]

Additionally, Minn. Rule 7350.6100 and 7350.9910 state in pertinent part that:

> **7835.6100 UNIFORM STATEWIDE CONTRACT.**
>
> The form of the uniform statewide contract for use between a utility and a qualifying facility having less than 40 kilowatts of capacity must be as shown in part 7835.9910.

> **7835.9910 UNIFORM STATEWIDE CONTRACT; FORM.**
>
> The form for the uniform statewide contract must be applied to all new and existing interconnections between a utility and cogeneration and small power production facilities having less than 1,000 kilowatts of capacity, except as described in part 7835.5900.[18]

The statute and rules when read together make clear that the unaltered contract must be presented to the QF, if the system is under 40kW. Here, Larry's original system is 9.156kW and he added

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16 Minn. Rule 7835.4012, subp. 1 (emphasis added).

17 Minn. Stat. § 216B.164, subd. 6 (c).

18 Minn. Rule 7350.6100; Minn. Rule 7350.9910.

an additional 9.156kW to make it 18.2kW, which is well under the 40kW threshold. Therefore, MN Valley was required by law to present him with an unaltered contract.

The only potential exception (outside of Minn. Rule 7350.6000's granting a cooperative to replace "Utility" with "Cooperative" where it appears in the contract) to the uniform statewide contract rule is in Minn. Rule 7350.9920, which states:

> **7835.9920 NONSTANDARD PROVISIONS**.
>
> A utility intending to implement provisions other than those included in the uniform statewide form of contract must file a request for authorization with the commission. The filing must conform with chapter 7829 and must identify all provisions the utility intends to use in the contract with a qualifying facility.[19]

While the merits of amending the contract to preclude a QF from selecting a rate for their excess generation is already questionable, we do not face that issue here today. Because even if that were a permissible use of the statute, MN Valley never filed a request to amend the statewide contract prior to providing the altered draft to Larry. As such, MN Valley failed to approve a nonstandard provision to the uniform statewide contract before submitting it to the QF for his signature.

CLAIM III

The utility has failed to inform the Commission of any new fee or the imposition of the new and mandatory "roll-over" program. Minn. Stat. § 216B.1611 created reporting requirements for all utilities in Minnesota and Minn. Rule 7835.0300 and Minn. Rule 7835.0400 require that each utility file their small power production tariffs and rate schedules with the Minnesota Public Utilities Commission on January 1st of that year.[20] While MN Valley has filed several

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19 Minn. Rule 7350.9920.

20 *See* Minn. Stat. § 216B.1611 (requiring cooperatives and municipal utilities to report to the Commission on "the new distributed generation facilities interconnected with the system since the previous year's report, any distributed generation facilities no longer interconnected with the utility's system since the previous report, the capacity of each facility, and the feeder or other point on the company's utility system where the facility is connected. The annual report must also identify all applications for interconnection received during the previous one-year period, and the disposition of the applications."); *See also* Minn. Rule 7835.0300 (stating "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, for its review and approval, a cogeneration and small power production tariff. The tariff for generating utilities must contain schedules A to G, except that generating utilities with less than 500,000,000 kilowatt-hour sales in the calendar year preceding the filing may substitute their retail rate schedules for schedules A and B. The tariff for nongenerating utilities must contain schedules C, D, E, F, and H, and may, at the option of the utility, contain schedules A and B, using data from the utility's wholesale supplier.").

documents with the Commission this year, they have not disclosed that they are now enrolling customers into the Minn. Stat. § 216B.164, subd. (f) "roll-over" program, nor have they had any fee approved that they told Larry was the alternative to the "roll-over" program.

Further substantiating the state statute and administrative rules, is the People's Energy Cooperative (PEC) Order in Docket 15-255. In that particular Docket, Alan Miller, an owner of a small QF wind turbine, requested a dispute resolution proceeding under Minn. Stat. § 216B.164, because PEC retroactively starting charging him a $5.00/month net metering fee.[21]

Upon Department of Commerce investigation, it was clear that PEC had failed to file documentation of the fee. The Commission found that People's Energy Cooperative was "in violation of Minn. R. 7835.0300 and .0400 for failing to file the proposed fee changes in 2014."[22] The Commission also noted that "[m]ost concerning, People's failed to file a revised tariff in 2014 when it imposed the new fee on its distributed-generation customers."[23]

Here, the program that Larry has been enrolled into acts like PEC's fee, as it hurts the solar array's economics. Larry's system will produce less in the winter than in the summer (due to the sun being out longer and less snow covering). Also because the "roll-over" program starts on January 1 of each year, it follows that the first three months will likely produce little or no energy, then the next six months will produce substantial excess energy, and the final three months of the year will again produce very little energy.

To show how impactful this is to Larry's bottom line, let's look at an instance where Larry would theoretically net $0. Assume that Larry's system produced enough kWh of energy where his bill was only -$3 between January and March of a given year (so he still had to pay $3 to his utility). Then assume his array produced enough kWh of energy between April and September to get him $6 from the utility for his excess generation. But then he had to again pay the utility another $3 between October and December, because the array didn't produce any excess.

If the above happened, then this rollover program would result in Larry losing out on $3 worth of energy, despite his net being $0 over the course of the year. Larry would have to pay for his net losses between January and March, and then credits would accrue to $6 during the summer. But the $6 worth of summer credits would not fully be offset by the October through December months of production, before the remainder would be cancelled out at the end of the year. Effectively Larry would lose $3 worth of credits simply because the "roll-over" program starts in January and this amounts to lost revenue.

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21 INITIAL FILING – REQUEST OF DISPUTE RESOLUTION, ALAN MILLER, Docket No. E-132/CG-15-255, Doc. ID. 20153-108114-01 (Mar. 12, 2015).

22 ORDER FINDING JURSIDCITION AND RESOLVING DISPUTE IN FAVOR OF COMPLAINANT, MINNESOTA PUBLIC UTILITIES COMMISSION, Docket No. E-132/CG-15-255, Doc. ID. 20159-114134-01 at 7 (Sept. 21, 2015).

23 *Id.*

Larry was aggrieved by the utility's failure to file this program, because he invested in a solar array with the intention of selecting another option under Minn. Stat. § 216B.164, subd. 3 that did not include a fee. Larry had no real notice of the "roll-over" program or the potential for a retroactively applied fee, because the utility never had either of those options approved by the Commission.

While requiring a customer to enter the "roll-over" program is already illegal, if MN Valley wanted to attempt implementing the program they should have at least made the Commission aware of the program change in their Tariff filings, and if Larry's other option truly is a $650 fee, then MN Valley should have filed this fee with the Commission for approval prior to threatening him with it. The utility gave Larry only two options, both of which required Commission approval, and he should be permitted to select a statutorily enumerated option of his choosing without the imposition of a retroactively applied fee.

CLAIM IV

The utility should be precluded from applying a fee or a "roll-over" program to Larry's system, because Larry's system was installed prior to July 1, 2015, and his new additional generation does not qualify as a new installation under the law.

When the state amended Minn. Stat. § 216B.164, subd. 3(a) and (f) the "effective date" stated that "[t]his section is effective July 1, 2015, and applies to customers installing net metered systems after that day."[24] Larry's system was originally installed in 2012. Larry's array's expansion occurred after July 1, 2015 and the utility decided that it wanted him to get a new production meter over the entire 18.2kW system. MN Valley's "roll-over" program or $650 fee is apparently over the entire 18.2kW.

We contend that no system was "installed" after July 1, 2015 and therefore the entire array is not subject to any fee or "roll-over" program. Larry *expanded* a pre-existing system that was originally designed to be increased. He did not "install" a new system under the statute.

Furthering this point is Minn. Stat. § 216B.164, subd. 1, which states "[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."[25] Here, Larry's system is one of only a handful in MN Valley's service territory, and his expansion could easily be grandfathered into his original system's agreement without having any appreciable impact on other cooperative members. The Commission should interpret "installed" to apply only to systems that are started from scratch, and not to system expansions, because this is the best way to "give the maximum possible encouragement to cogeneration and small power production."

But if the Commission does believe that Larry installed some of the system after July 1, 2015, then we contend that at least the first 9.152kW of the system was installed prior to July 1, 2015

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[24] Chapter 1, H.F.No.3, June 13, 2015.

[25] Minn. Stat. § 216B.164, subd. 1.

and should not be entered into the "roll-over" program or be subject to any fees. MN Valley installed a new production meter to read the entire system's production and it seems that the entirety of the 18.2kW has been treated as if it was installed after July 1, 2015.

Larry should not be penalized for expanding his system by having his entire array entered into a "roll-over" program. MN Valley is effectively going back to the original statewide contract Larry signed and nullifying it, because they want to service the entire array through one meter. If the Commission determines that the additional 9.156kW was a "new" array and subject to either fees for fixed costs or the "roll-over" program, then we contend that the original installation and expansion should be treated as separate entities for billing purposes.

REQUEST FOR RELIEF

WHEREFORE, the QF, Larry Fagen, requests:

1. The signed contract between Larry and MN Valley is deemed void and cancelled;
2. MN Valley present a new contract for Larry that complies with state law and is the uniform state-wide contract, including an option to select compensation under Minn. Stat. § 216B.164, subd3(d);
3. MN Valley is precluded from implementing a retaliatory or retroactive fee against Larry in any subsequent agreement;
4. MN Valley pay Larry's costs, disbursements and reasonable attorneys' fees, as required by Minn. Stat. § 216B.164, subd. 5.

Respectfully submitted,

David Shaffer, esq.
Staff Attorney
Minnesota Solar Energy Industries Project
Email: shaff081@gmail.com
Phone: 612-849-0231

PUBLIC REPRESENTATION AGREEMENT

This is a Public Agreement for civil legal services and representation between the David Shaffer, hereafter called the "Legal Representative", and Larry Fagen, hereafter called the "Client". It will be attached to any complaint filed with the Public Utilities Commission's Consumer Affairs Office, with the Public Utilities Commission or the Department of Commerce directly.

The Client hereby authorizes the Legal Representative, as an attorney for the Minnesota Solar Energy Industries Project, to represent the Client in the Minnesota Public Utilities Commission matter described as follows:

A statewide contract dispute against Minnesota Valley Cooperative.

The Legal Representative's obligations and duties under this Agreement will end and he will no longer be my representative, subject to necessary court or agency approval, under the following circumstances:

(a) The matter has received a final adjudication in the current legal forum;
(b) The legal service it has agreed to provide has been completed;
(c) Further representation would be useless, unreasonable, or would not help achieve the Client's objectives;
(d) The Client has failed to cooperate in the representation; or,
(e) When otherwise mandated or allowed by the legal Rules of Professional Conduct.

None of the above circumstances currently apply.

I have received and retain a copy of this Representation Agreement. I agree to allow the Legal Representative to provide a copy of this Representation Agreement to the Public Utilities Commission's Consumer Affairs Office and with the Public Utilities Commission or the Department of Commerce directly, if the need arises.

Date: 10- Feb-16

Larry Fagen
Client

Date: February 9, 2016

David Shaffer, esq.
Legal Representative