

E-123/CG-92-1171 ORDER REQUIRING CERTAIN PAYMENTS BY MR. NELSON
AND BY MINNESOTA VALLEY, FINDING MR. NELSON A PREVAILING PARTY,
AND REQUIRING FURTHER FILINGS IF AGREEMENT BETWEEN THE PARTIES IS
NOT REACHED

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner
Norma McKanna	Commissioner

In the Matter of the Complaint
of Stan Nelson Against Minnesota
Valley Cooperative Light & Power
Association

ISSUE DATE: January 21, 1993

DOCKET NO. E-123/CG-92-1171

ORDER REQUIRING CERTAIN PAYMENTS
BY MR. NELSON AND BY MINNESOTA
VALLEY, FINDING MR. NELSON A
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PROCEDURAL HISTORY

On October 2, 1992, Mr. Stan Nelson filed a complaint against Minnesota Valley Cooperative Light & Power Association (Minnesota Valley or the Co-op). Mr. Nelson is the owner of a wind power machine which is a small power production facility. In his complaint, Mr. Nelson alleged that the Co-op acted without authority when it installed a transformer to interconnect his facility with its system, and that its charges for the transformer were excessive, discriminatory and unnecessary.

On October 21, 1992, the Co-op filed an answer to the complaint, denying Mr. Nelson's allegations.

Mr. Nelson filed comments in response to the answer on November 23, 1992.

On November 24, 1992, the Department of Public Service (the Department) filed comments.

The Co-op filed a reply on December 17, 1992.

The matter came before the Commission for consideration on January 7, 1993.

FINDINGS AND CONCLUSIONS

The main issues raised by the parties to this dispute are: the propriety of the Co-op's installation of the 37.5 kVA transformer and subsequent assessment of costs; the propriety of the Co-op's imposition of a monthly minimum charge upon Mr. Nelson; and recovery of attorneys' fees. After an introductory discussion of the factual background in this matter, the Commission will examine the issues in turn.

I. Factual Background

Mr. Nelson built a 35-KW wind machine which was interconnected with the Co-op's electrical generating system on or about July 10, 1992. Prior to the interconnection, Mr. Nelson and Minnesota Valley entered into a contract governing such issues as interconnection, use of electricity and billing rates. The contract conformed to the Uniform Statewide Contract found in the Commission's rules governing cogeneration and small power production, Minn. Rules, Part 7835.9910. Under the contract, Mr. Nelson would be responsible for the actual, reasonable costs of interconnection, which were estimated to be \$710.00. During each billing period, Minnesota Valley would bill Mr. Nelson for the excess of energy supplied by the Co-op above energy supplied by Mr. Nelson's wind machine, according to the Co-op's applicable retail rate schedule.

Prior to interconnection, Mr. Nelson paid the Co-op a one-time fee of \$626.97. This amount was the Co-op's determination of the actual costs of interconnection, which had previously been estimated at \$710.00. The \$627 represented the costs of materials for the interconnection, plus certain labor. It did not include the \$677 cost of the transformer itself. In July, 1992, the Co-op sent Mr. Nelson a bill which included \$41.25 for what was termed a "monthly transformer charge." The Co-op explained that it would be billing Mr. Nelson this amount on a monthly basis pursuant to its tariff.¹

Mr. Nelson filed a formal complaint with the Commission on October 2, 1992. In the complaint, Mr. Nelson requested the following relief:

¹ During these proceedings the Co-op stated that the existing 10 kVA transformer located on Mr. Nelson's property was adequate only to serve Mr. Nelson from Minnesota Valley's power sources; when Mr. Nelson built the 35 KW wind machine, a 37.5 kVA transformer was necessary to interconnect with it.

1. That the Commission find that the charges imposed upon the Complainant are discriminatory and unlawful and order the Respondent to cease and desist from imposing any charge for a transformer;
2. That the Commission order the Respondent to cease and desist from requiring any transformer other than that which is necessary to protect the safety of the public or the Respondent's employees or to protect the system's reliability;
3. That the Commission order the Respondent to refund any and all amounts collected from him in excess of the lawful rate;
4. That the Commission order the utility to pay the Complainant's reasonable costs, disbursements and attorneys' fees.

II. Propriety of the Construction of the 37.5 kVA Transformer

Positions of the Parties

MR. NELSON

Mr. Nelson did not concede that the installation of the 37.5 kVA transformer was necessary for his purposes. He questioned if a 25 kVA transformer might have been sufficient for the purposes of interconnection with the Co-op. Mr. Nelson stated that the transformer was not necessary under the applicable rule, Minn. Rules, Part 7835.5000, Separate Distribution Transformer, which states:

The utility may require a separate distribution transformer for the qualifying facility if necessary either to protect the safety of employees or the public or to keep service to other customers within prescribed limits.

According to Mr. Nelson, the transformer was not necessitated by any of the factors listed under the rule, and therefore was not justified under the rule.

Mr. Nelson argued further that a utility which chooses to install a transformer to facilitate interconnection with a small power producer was not then free to pass the costs to the small power producer.

Although Mr. Nelson maintained his position regarding the aforementioned arguments, Mr. Nelson's representative indicated at the January 7 Commission meeting that Mr. Nelson was willing to pay as an additional interconnection cost the \$677 cost of the transformer itself. The Department had recommended that the \$677

cost of the actual transformer equipment and the \$627 previously paid as parts and labor for connecting Mr. Nelson's wind machine to the Co-op's system should be considered the total cost of interconnection. Mr. Nelson's representative indicated that he was willing to pay the additional \$677 on a one-time basis if the Co-op accepted it as a total settlement of the dispute and dropped the monthly charges from his bill.

MINNESOTA VALLEY

Minnesota Valley stated that installation of the 37.5 kVA transformer was necessary to accommodate the interconnection of Mr. Nelson's 35 KW wind generator to the Co-op's system. The next smaller size transformer, rated at 25 kVA, would be subject to burn-out or delivery of low voltage to other customers on the line if the transformer operated under overload conditions. The construction of the 37.5 kVA transformer was thus necessary to the interconnection and justified under Minn. Rules, Part 7835.5000.

According to the Co-op, its internal rules clearly state that it will charge a small power producer the costs of a larger transformer when it must be installed in order to interconnect with the power producer's facility. The Co-op argued that treating Mr. Nelson any differently from any other similarly situated customers under the Co-op's rules would be a form of discrimination in Mr. Nelson's favor.

THE DEPARTMENT

The Department agreed with the Co-op that it was necessary to install the 37.5 kVA transformer in order to interconnect with Mr. Nelson's wind machine. Based upon invoices provided by the Co-op, the Department decided that it would be reasonable for the Co-op to assess Mr. Nelson \$677, the cost of the transformer itself, as well as the \$627 cost of materials and labor for connecting the Nelson generator to the Co-op system. The Department therefore recommended that the Commission find reasonable the construction of the transformer and the subsequent assessment of interconnection costs, which equaled \$677 plus \$627.

COMMISSION ACTION

The Commission is aware that Mr. Nelson has not conceded the necessity of the installation of the transformer. The Commission is also aware that Mr. Nelson has agreed to pay \$677, the price of the transformer, in addition to the \$627 already paid for the process of interconnection. Under these particular circumstances, therefore, the Commission concludes that it is not necessary to make a finding on the propriety of the installation of the transformer or the subsequent assessment for its

connection costs. The Commission will therefore proceed to an examination of the propriety of the Co-op's cost assessment methodology.

II. Propriety of the Co-op's Monthly Minimum Charge

Positions of the Parties

MR. NELSON

Mr. Nelson argued that he had agreed to pay only \$710, the amount stipulated in his contract with the Co-op, as reasonable costs of interconnection with the Co-op's system. According to Mr. Nelson, he had not agreed to any "transformer monthly minimum" which was now being charged by the Co-op. Mr. Nelson argued that the Co-op's imposition of the monthly charge was an attempt to shift part of its normal distribution costs from all customers onto small power producers.

Mr. Nelson also stated that his small power production facility did not increase the Co-op's energy load. Mr. Nelson therefore reasoned that it was discriminatory for the Co-op to impose a monthly charge upon him which was meant to be applied to entities who increase a system's load.

MINNESOTA VALLEY

Minnesota Valley argued that a \$41.25 monthly transformer charge, covering the cost of the transformer itself, fixed costs, and additional operating and maintenance costs, was reasonable in this case. Minnesota Valley pointed out that its rate schedules and internal rules uniformly impose the same type of monthly minimum charge upon all members requiring transformer service greater than 10 kVA. The Co-op stated that it considered the monthly charge a rate for service rather than an interconnection charge. If the monthly charge were considered an interconnection charge, it is still permissible under Minn. Rules, part 7835.2500.

The Co-op stated that Mr. Nelson was informed both of the one-time interconnection costs (estimated at \$710) and of the monthly minimum charge at the time the Co-op and Mr. Nelson were negotiating their contract. The Co-op argued that Mr. Nelson had evidenced agreement to the monthly charge when he proceeded to build his wind generator.

Minnesota Valley disagreed with Mr. Nelson's statement that he is decreasing the Co-op's load. Because Mr. Nelson's generation depends upon wind, it is not a firm power source and cannot be considered a net increase of capacity when calculating the Co-op's overall capacity.

The Co-op argued that any customer who has requirements beyond the average needs of the customer's class must pay for those requirements. Thus, this customer's transformation needs, which are larger than average, must be absorbed by the customer through the monthly charge rather than imposed upon the entire customer class.

THE DEPARTMENT

The Department stated that it is reasonable for Minnesota Valley to recover the cost of interconnecting Mr. Nelson's facility to its system through the use of the 37.5 kVA transformer. The Department thus found appropriate the imposition of the \$627 interconnection cost plus the \$677 cost of the transformer itself. The Department did not agree with the Co-op that the cost of the transformer could be recovered through the imposition of a monthly charge.

The Department found the concept of the monthly charge inappropriate for several reasons. The Co-op did not include anything beyond the estimated \$710 in its estimate of interconnection charges. There was no evidence that Mr. Nelson's demands or usage patterns increased after the installation of the 37.5 kVA transformer in place of the 10 kVA transformer; there was therefore no justification for the imposition of monthly charges for higher operating and maintenance costs or fixed costs. Finally, a monthly charge fixed indefinitely could eventually go beyond recovery of the \$677 cost of the transformer; anything beyond that recovery would be excessive.

For these reasons, the Department recommended that Mr. Nelson pay the \$677 cost of the transformer in a one-time payment, and that the Co-op cease imposing the \$41.25 monthly charge.

COMMISSION ACTION

The Commission agrees with the analysis of the Department. Mr. Nelson is a residential customer who at times receives power from the Co-op under the Co-op's residential tariff. Nothing in the evidence presented by Minnesota Valley persuades the Commission that Mr. Nelson should be charged anything but the normal monthly residential rate for service received.

The issue of the Co-op's proposed monthly "transformer charge" is really a rate design issue. In the future, the Co-op may seek approval for a different rate to be imposed upon small power producers who are connected to the Co-op system and are also Co-op customers. No such separate rate exists at this time. The Co-op has no justification for imposing a monthly charge beyond the normal residential rate for this customer's usage.

The Commission therefore finds that Mr. Nelson should pay the \$677 cost of the transformer (as Mr. Nelson has previously agreed) as a one-time interconnection cost. The Co-op shall cease imposing the \$41.25 monthly transformer charge upon Mr. Nelson. In addition, the Co-op shall pay Mr. Nelson for all net energy delivered by him since the monthly charges were imposed.²

III. Attorneys' Fees

A Minnesota statute and rule govern the issue of attorneys' fees when a dispute between a utility and a small power producer or other type of qualifying facility (QF) has been resolved by the Commission:

Minn. Stat. § 216B.164 COGENERATION AND SMALL POWER PRODUCTION

Subd. 5. Disputes. 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. The commission in its order resolving each such dispute shall require payments to the prevailing party of the prevailing party's costs, disbursements, and reasonable attorneys' fees, except that the qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the commission finds that the claims of the qualifying facility in the dispute have been made in bad faith, or are a sham, or frivolous.

Minn. Rules, part 7835.4550 FEES AND COSTS

In the order resolving the dispute, the commission shall require the prevailing party's reasonable costs, disbursements, and attorneys' fees to be paid by the party against whom the issue or issues were adversely decided, except that a qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the commission finds that the claims of the qualifying facility have been made in bad faith or are a sham or frivolous.

² The Commission notes that its decision in this case does not mean that a monthly charge is necessarily an inappropriate method of collecting interconnection costs from small power producers or other qualifying facilities. Minn. Rules, part 7835.2500 permits payments for interconnection costs to be made on a one-time basis when incurred, or according to any schedule agreed to by the QF and the utility.

In this case, the Commission has resolved the issues raised by a QF (Mr. Nelson in his capacity as the owner of a wind power machine) in a complaint against a utility (Minnesota Valley). The above statute and rule must then be applied in order to determine if attorneys' fees should be granted for either party.

The Commission has previously outlined a procedure it will follow to determine if attorneys' fees will be awarded under the above statute and rule. In its January 26, 1990 ORDER REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES³ in a QF/utility dispute known as the Dakota-Winona case, the Commission developed a test for the determination of attorneys' fees. In developing the test, the Commission looked to a United States Supreme Court decision, Hensley v. Eckerhart 461 U.S. 424 (1983), which addressed the issue of attorneys' fees following a federal civil rights action. Following the two-part procedure used in Hensley and Dakota-Winona, the Commission must first determine whether the plaintiff is a prevailing party eligible for reimbursement of attorneys' fees, then determine what level of fee recovery is reasonable, based on the results obtained.

Although the Commission will continue to explore alternative methods of attorneys' fee determination following QF/utility disputes, the Commission finds that the Hensley/Dakota-Winona model is appropriate in this set of circumstances and will follow it. The first issue to be determined is therefore whether a party is a prevailing party under the Hensley/Dakota-Winona test.

In Dakota-Winona the Commission stated that a finding that a party prevailed in a QF/utility dispute is the threshold determination for recovery of attorneys' fees. In determining if a party prevailed, "[t]he standard to be applied is success on any significant issue which achieves some of the benefit the parties sought in bringing suit." Dakota-Winona at p. 4. In a recent decision following the Hensley (and thus Dakota-Winona) procedure, the United States Supreme Court found that even a nominal award of damages makes the plaintiff a prevailing party. Farrar v. Hobby, 61 LW 4033 (December 20, 1992).

Applying the first part of the Hensley/Dakota-Winona test to the case now before the Commission, the Commission finds that Mr. Nelson is a prevailing party. Although the requests for relief in Mr. Nelson's complaint were not specifically granted, Mr. Nelson did receive some of the benefit sought in the suit:

³ In the Matter of the Joint Petition of Dakota County and Winona County for an Order Resolving Disputes Relating to Purchases by Northern States Power Company of Electric Power from the Operation of Solid Waste Recovery Facilities to be Located in Dakota and Winona Counties, Minnesota, Docket No. E-002/CG-88-489.

financial relief from the Co-op's charges arising from the interconnection of his facility with the Minnesota Valley system. Although Mr. Nelson will pay the costs of interconnection and of the transformer itself on a one-time basis, he will be relieved from the imposition of monthly "transformer charges." Mr. Nelson's financial obligation to the Co-op will be reduced; this is the essence of his complaint, the reason he came before the Commission.

Mr. Nelson's success, though partial, is significant. If Mr. Nelson had continued to pay the monthly charges for a long enough time, he could eventually have paid much more than the actual cost of the transformer. Mr. Nelson's success could thus be beyond the nominal amount found sufficient in Farrar v. Hobby.

The Commission has found that Mr. Nelson has prevailed on a significant issue in litigation which achieves some of the benefit he sought in bringing suit. Mr. Nelson has therefore passed the threshold determination for recovery of attorneys' fees under Hensley/Dakota-Winona, and is deemed a prevailing party.

Under the second part of the two-part formula for determination of attorneys' fees, the Commission would then decide what fees would be reasonable for Mr. Nelson to recover. To do this, the Commission would multiply the number of attorneys' hours expended on the case by the hourly rate applied. This figure would then be adjusted in two ways: first, attorneys' fees would be limited to time spent on claims in which the complainant prevailed; second, the complainant's level of success would be weighed to adjust the award upward or downward.

In order to apply the second half of the Hensley/Dakota-Winona formula, the Commission must analyze documentation on such matters as the attorneys' hours spent on the case, the proposed hourly rate, any common core of facts which links some or all issues in the matter, and prevailing reasonable rates for this type of representation. The Commission does not have this documentation before it at this time, and would require it before any final determination of attorneys' fees was reached.

At this time, however, the attorneys representing the Co-op and Mr. Nelson have agreed that they will meet in an attempt to reach a settlement regarding the Co-op's payment of Mr. Nelson's attorneys' fees. Mr. Nelson's attorney has agreed to provide the Co-op's attorney with copies of his bills.

Both parties and the Commission are aware that a contested case proceeding to settle this matter would be expensive and time-consuming, and should be avoided if possible. The Commission therefore strongly urges the parties to reach an agreement regarding the issue of attorneys' fees. If the parties are

unable to reach an agreement within 30 days of the date of this Order, Mr. Nelson's attorney must file his bills and other relevant documentation with the Commission. The Commission will review the material and set this matter for further proceedings.

ORDER

1. Within 30 days of the date of this Order, Mr. Nelson shall pay the Co-op \$677.64 as a one-time interconnection cost.
2. The Co-op shall remove the \$41.25 monthly transformer charge from Mr. Nelson's bill, and shall pay Mr. Nelson for all net energy delivered by Mr. Nelson to the Co-op system since the monthly charge was first imposed.
3. Mr. Nelson is a prevailing party within the meaning of Minn. Stat. § 216B.164, Minn. Rules, part 7835.4550 and Commission precedent.
4. Representatives of Mr. Nelson and the Co-op shall meet to attempt to reach settlement regarding the payment of Mr. Nelson's attorneys' fees by the Co-op. If no agreement is reached within 30 days of the date of this Order, Mr. Nelson's attorney shall file copies of his bills and other relevant documentation with the Commission for further consideration.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)