

E-125/CG-92-1345 ORDER DISMISSING COMPLAINT AND MODIFYING SETBACK
REQUIREMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Marshall Johnson
Cynthia A. Kitlinski
Dee Knaak

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint
of Minnesota Windpower, Inc.
Against Lyon-Lincoln Electric
Cooperative, Inc.

ISSUE DATE: October 18, 1993

DOCKET NO. E-125/CG-92-1345

ORDER DISMISSING COMPLAINT AND
MODIFYING SETBACK REQUIREMENT

PROCEDURAL HISTORY

I. Proceedings to Date

On November 24, 1992, Minnesota Windpower, Inc. (Minnesota Windpower or the Complainant) filed a complaint against Lyon-Lincoln Electric Cooperative, Inc. (the Co-op or the Respondent). The complaint alleged improprieties in the Co-op's application of setback requirements to wind-driven generating facilities.

On December 15, 1992, the Co-op filed its answer to the complaint.

On December 28, 1992, the Department of Public Service (the Department) filed comments.

On January 13, 1993, Minnesota Windpower filed a reply.

On February 24, 1993, Minnesota Windpower filed a motion to supplement the record. The Complainant requested that the Commission accept into evidence six photographs purporting to show towers and other structures within the Co-op's service area.

On May 21, 1993, the Commission issued its ORDER DENYING MOTION TO SUPPLEMENT THE RECORD AND REQUIRING FURTHER FILINGS. In this Order, the Commission directed the parties to submit affidavits on the following questions:

- a. Is it reasonable for the Co-op to have a setback requirement as a technical connection or operating specification?
- b. If it is reasonable for the Co-op to have a setback requirement as a technical connection or operating specification, what is a reasonable formula for the setback requirement?

- c. If the Co-op's formula for a setback requirement is found to be reasonable, is the Co-op acting in a discriminatory fashion in its application of the requirement to Minnesota Windpower as a wind generated qualifying facility?

In addition, the Commission denied the Complainant's motion to supplement the record with six photographs but did so without prejudice to the Complainant's resubmission of the six photographs along with the affidavits.

On June 8, 1993, Minnesota Windpower filed affidavits of Jeff Bendel and Robert W. Hinshaw, including the photographs previously offered.

On June 21, 1993, the Department filed the affidavit of Daniel Ahrens and Lyon-Lincoln filed the affidavit of Michael D. Buckle. An amended version the Buckle affidavit, correcting a word-processing error, was filed on June 25, 1993.

On September 23, 1993, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

II. Commission Deliberations

In its Complaint, Windpower alleged that the Co-op's setback requirement

1. was an attempted zoning regulation which is outside the Co-op's authority under Minnesota law;
2. was an excessive and unnecessary technical requirement; and
3. unlawfully discriminated against the Complainant solely because of the Complainant's status as the owner of a qualifying facility.

In its reply filed January 13, 1993, Windpower restated these allegations and added that the Co-op could not impose its setback requirement as a precondition to interconnection because it was not a technical connection or operating specification within the meaning of Minn. Rules, part 7835.4800.

The setback requirement in question states:

Wind-driven generating facilities, for safety purposes, shall be connected by underground conductor of a horizontal length not less than 1.5 times the fall distance of the generating facility from the utility facility(s).

At the September 23, 1993 hearing, the parties agreed that the matter could be decided by the Commission on the basis of the current record without recourse to a contested case proceeding and waived their right to such a proceeding. On September 27, 1993, filings confirming that waiver were received from Windpower and the Co-op. Having reviewed the materials filed by the parties and heard their arguments on this matter, the Commission makes the following findings:

A. The Co-op's Setback Requirement is a Technical Operating Specification Within the Meaning of Minn. Rules, Part 7835.4800

Windpower has challenged the validity of the Co-op's setback requirement. Under that requirement, a qualifying facility must locate its wind tower at least one and a half times the height of the structure¹. The Co-op asserted that it was authorized to impose such a requirement as a precondition to interconnecting with the QF under Minn. Rules, part 7835.4800. That rule, among other things, authorizes a utility to include in its contract "reasonable technical connection and operating specifications."

The threshold question is whether the Co-op's setback requirement is a technical connection or operating specification. Windpower argued that it was not such a specification, but was instead in the nature of a zoning requirement or a state rule.

1. The Setback Requirement is Not a Zoning Regulation

Zoning authority for the property in question, Windpower noted, is vested exclusively in the county. Hence, according to Windpower, the utility's rule constitutes an unlawful exercise of zoning authority and is null and void. In support of its characterization of the setback rule as zoning, Windpower argued that the requirement had nothing to do with the safe connection or operation of the wind tower and was, in effect, a zoning measure.

The Commission disagrees. There is nothing in Minn. Rules, part 7835.4800 to suggest that measures adopted by zoning officials

¹ In this Order, the setback distances are measured from the point at the wind tower's base that is nearest the Co-op's nearest electric lines to a point directly under those lines. Setbacks of different length are delineated by comparing the tower's height (measured from the base to the extended tip of the blade) to the distance required between the base of the tower and the Co-op's lines. For example, a "1.5" setback requires the base of the tower to be 1.5 times the height of the structure from the point directly under the Co-op's nearest electric lines. A "1.0" setback would require a distance equal to the height of the structure from the point directly under the Co-op's nearest electric lines to a point on the tower's base nearest to the Co-op's nearest electric lines.

are, for that very reason, precluded from also serving as valid technical operating specifications. Certainly not all zoning requirements would qualify as technical operating specifications, but the fact that setbacks have been adopted by zoning authorities does not necessarily preclude their usefulness as technical operating specifications. In this case, the setback in question deals directly with a technical concern (safe operation of the wind tower) as discussed more fully below. In short, it assures the safety of Co-op equipment if the tower falls.

2. The Fact That the Commission Has Not Promulgated a State Setback Rule is Not Determinative

Windpower asserted that the exclusive authority to adopt interconnection standards under the Public Utilities Regulatory Policies Act of 1978 and Minnesota Statutes is the Commission. Windpower went on to assert that since the Commission has not adopted a setback rule for wind generators, the Co-op has no authority to adopt and enforce its own interconnection standard. However, the Commission has adopted a rule which states in part:

The utility must be permitted to include in its contract reasonable technical connection and operating specifications for the qualifying facility. Minn. Rules, part 7835.4800.

The fact that the Commission has not adopted the specific setback requirement at issue in this matter as a rule is not relevant if the Co-op's setback requirement is authorized by Minn. Rules, part 7835.4800.

3. Commission Analysis

The Commission finds that a setback requirement for wind towers is a "technical...operating specification" within the meaning of Minn. Rules, part 7835.4800. Clearly, requirements that provide for the safety of adjacent facilities and injury to the public during the operation of the wind tower are specifications relating to the operation of the wind tower.

Windpower asserted that its generator was programmed to shut down during the danger period of extremely high winds. During this shut down period, its generator stops producing electricity and is, hence, not "operating." Because the setback requirement would not serve any protective purpose during the period Windpower defined as "operation," the setback requirement could not be considered an "operating specification." In adopting this language, the Commission did not intend the narrow concept of "operating" advanced by Windpower, a concept which relates exclusively to the production of electricity and ceases abruptly when the generator is not producing electricity.

The Commission finds that when the text of Minn. Rules, part 7835.4800 is read in its entirety, the plain meaning of the term "operating" applies to the QF from the moment it is

interconnected with the utility's power system with the approval of the utility. Accordingly, a requirement such as the Co-op's setback requirement that prescribes conditions for such operation is clearly a "technical operating specification" within the meaning of the Commission's rule.

Finally, Windpower asserted that finding that the term "technical operating specification" includes a setback requirement is an interpretive rule, void for failure to follow proper rulemaking procedures. The assertion is without merit. Administrative agencies charged with the enforcement of rules routinely apply rule language to specific cases. If it were necessary to promulgate an interpretive rule every time an agency so charged applied rule language to a new set of facts, government administration would quickly grind to a halt. More basically, this case does not involve interpretative rulemaking; it involves application of the plain meaning of a rule to a specific set of facts.

Having found that the Co-op's setback requirement is a technical operating specification², the next question is whether, in principal, a setback requirement for wind towers is an appropriate measure.

B. A Setback Requirement For Tall Heavy Structures of Unknown Structural Integrity Such as Wind Towers is Appropriate

1. The Co-op

The Co-op argued that a setback rule was necessary because it had no control or assurance that wind towers were capable of withstanding the stresses caused by vibration, ice load, wind, or other natural forces or that the wind towers would be properly erected or secured to the ground. The Co-op cited the lack of industry standards to certify that the wind towers have been safely designed and constructed. With respect to the structure

² The parties have analyzed the Co-op's setback requirement in terms of whether it is a "technical operating specification". A technical operating specification appears to be a subset of the general category termed "applicable utility rules" as that term is used in Minn. Rules, Part 7835.4800 which states in part:

The utility must withhold approval [to interconnect] only for failure to comply with applicable utility rules not prohibited by this chapter or governmental rules or laws." (Emphasis supplied.)

Given this finding, the Commission need not determine whether the setback requirement would qualify as an "applicable utility rule" notwithstanding its failure to qualify for the possibly narrower category, "technical...operating specification".

at issue in this matter, the Co-op alleged that Windpower had not provided credible information as to the structural strength of its wind towers and generators.

2. The Department

The Department argued that a setback requirement is reasonable because utilities have no guarantee of the structural integrity of QF towers and the setback requirement assures that no QF towers will topple onto utility facilities. The Department stated its belief that a 1.0 setback requirement would be appropriate.

The Co-op and the Department noted that other utilities had adopted similar setback requirements for QF facilities.³

3. Windpower

In its Complaint, Windpower alleged among other things that the Co-op's setback requirement was excessive and unnecessary. Windpower appeared to assert that applying a setback requirement of any size against any wind tower was unreasonable and discriminatory.

In its June 18, 1993 affidavit, Windpower presented a more limited argument, that a setback requirement was unreasonable as applied to its wind turbine, a MWI Windharvester turbine. Windpower disputed the Co-op's and the Department's claims that there was no assurance of structural integrity and proper installation of this structure. Windpower cited documentation submitted with its affidavit and argued that this documentation showed that its tower was built to very stringent engineering specifications to easily handle all of the loads subjected to it.

4. Commission Analysis

Information attached to Windpower's June 18, 1993 affidavit purporting to demonstrate the strength of its particular wind tower is not relevant to Windpower's principal charge which is under examination here, i.e. that the Co-op's setback requirement for wind towers is excessive and unnecessary (unreasonable) in general. Further, Windpower did not present this information regarding the structural integrity of its wind tower to the Co-op until several months after instituting its complaint. At the time when the Co-op applied its setback requirement to Windpower's structure, none of this information had been supplied. The reasonableness of the Co-op's action at that time

³ The Commission does not view the fact that other utilities have adopted similar setback requirements to be a strong indication that the Co-op's requirement is reasonable. Certainly the fact sheds no direct light on the reasonableness of the measure. The best it can do is indicate obliquely that others think there is a real problem here that must be addressed. The Commission would not view this as substantial in itself.

cannot be judged in light of the later-provided information.

Setting this late-provided information aside, therefore, the Commission will proceed to examine Windpower's charges: first, that a setback requirement for wind towers is unreasonable in general; and second, that it discriminates against wind generators.

Wind towers are tall structures of unknown and possibly widely varying structural integrity which bear heavy loads on the top and are exposed to a wide variety of climatic conditions. Additionally, the top of the structure holds a spinning blade assembly. In the Commission's view, the erection of such structures within falling distance of Co-op lines does pose potential for a significant amount of harm. As the Co-op noted, there is nothing in the Rules to prevent a customer from digging a hole in the back yard, inserting a 100-foot-long 4x4, mounting a wind generator on top of it, and requesting interconnection. Absent the utility's ability to safeguard against this danger by imposing certain operational specifications as preconditions to interconnection, a utility would be required to interconnect and start buying electricity from a customer who had erected such a structure. In the event that a wind tower is structurally inadequate (due to design or installation flaws), the falling structure (quite heavy at the top due to the weight of the generator and blades) could do significant damage to electric lines that it crashed into, thereby inconveniencing and endangering the Co-op's customers and the general public. In short, the potential for damage posed by a falling wind tower is significant.

The Co-op has an obligation to safeguard against such damage. In the absence of some reliable assurance that wind towers constructed within falling distance of its lines will be structurally adequate to handle their loads in conditions they are likely to experience, it would be imprudent for the Co-op simply to assume such structural adequacy. Accordingly, the Co-op may and should take a reasonable means to safeguard against the consequences of the fall of such a tower.

The Commission finds that a setback requirement is an appropriate means to minimize the possibility of damage due to such eventualities. While not completely eliminating the possibility that part of the falling structure may be blown against the line and do damage, it appears that a reasonable setback requirement would be a very effective safeguard against the effects of a falling tower in most instances while posing no significant burden on the wind tower owner. In addition, a setback requirement has the advantage of being objective; compliance with the requirement is easily verified. Ease of verification

minimizes the administrative burden on the Co-op and reduces the chances of real or apparent discriminatory application by the Co-op.

C. A 1.1 Setback Requirement For Wind Towers is Reasonable

Whether the particular setback adopted by the Co-op is of a reasonable size, however, is another matter. In assessing the Co-op's 1.5 setback, the Commission is mindful that its QF Rules are to be applied so as to give the "maximum possible encouragement to cogeneration and small power production consistent with protection of the rate payers and the public." Minn. Rules, part 7835.0200. In assessing the reasonableness of the size of the Co-op's setback requirement, the Commission must balance protection of the rate payers and the public with the goal of encouraging cogeneration and small power production.

In so doing, the Commission finds that the Co-op's 1.5 setback requirement is overly burdensome. It appears that the great preponderance of the identified risk could be reduced by a shorter fall space. A 1.5 setback requirement would make it more likely that some small property owners would be unable to build a complying wind tower with no significant gain in safety. The likelihood that a tower would "walk upright" half its length toward the Co-op's line before falling over seems remote at best.

At the same time, the Commission is not persuaded that the 1.0 setback proposed by the Department is adequate. In the event of the wind tower falling toward the Co-op's lines, a 1.0 setback would provide adequate protection only if the uprooted legs of the fallen tower landed exactly at its base. Given the wind turbulence and tower momentum likely to accompany such a fall, such a landing could not be assured. Instead, the Commission will approve a 1.1 setback. The relatively short additional distance (10 percent of the tower's height) would appear adequate to provide the necessary margin and eliminate the preponderance of risk. There is no evidence that such a setback would prevent the successful operation of a wind generator.

D. A 1.1 Setback Requirement For Wind Towers is Not Discriminatory Against QFs

Windpower alleged two instances of discriminations. First, Windpower alleged that the Co-op discriminates against all wind generators by allowing many other structures to be located next to its facilities without a setback, structures which pose a far greater threat to the Co-op's facilities than a wind generator. In such circumstances, Windpower argued, imposing a setback is discriminatory against all wind generators. Second, Windpower argued that since the Co-op had allowed another wind generator to connect in violation of the setback requirement, it was discriminatory for the Co-op to invoke the setback requirement in this case.

1. Discrimination Against All Wind Generators

Windpower cited three kinds of structures that it alleged posed greater potential for damage than their own structure: commercial communications towers, television antennae, and grain leg towers. The Commission finds that there are substantial differences between Windpower's wind tower and the three cited facilities that justify the Co-op's different treatment of them.

1. Regarding grain elevators, unlike the wind generators all the moving parts of these structures are inside the grain legs and are not exposed directly to wind and weather conditions.
2. As for television antennae, these structures may resemble wind towers in height, but the total weight and weight distribution in these structures is materially different. Besides being significantly lighter overall, television antennae do not have the same amount of weight at the top. The weight of the sizeable generator at the top of the wind tower clearly distinguishes the wind tower from a television antenna and warrants a safeguard. Given this weight disparity, the velocity and force with which the two structures would have upon impact and the amount of damage that the fallen structures could be expected to do are not of comparable magnitude.
3. Finally, with respect to commercial communications towers, these structures, unlike wind towers, are constructed according to industry-wide standards promulgated by the American National Standards Institute. In the absence of such a reliable basis for assuring structural integrity of wind towers, the need for a safeguard such as a setback requirement is apparent.

In sum, the Commission finds that a setback requirement for wind towers does not discriminate against owners of these structures.

2. Discrimination Against Windpower

Windpower stated that the Co-op had allowed another QF (hereinafter referred to as the Verly wind tower) to interconnect a wind tower that was located in violation of the 1.5 setback requirement. Windpower argued that this showed that the Co-op did not enforce this requirement against all QFs, but was selectively enforcing its setback requirement against Windpower, a discriminatory act.

The Commission has reviewed how this discrepancy occurred and finds no discrimination. It appears that there were only two instances of wind towers being erected within the 1.5 setback distance: the Verly wind tower and the Windpower wind tower. Clearly, this number is insufficient to show that the Co-op routinely ignored its setback requirement. More important, in the Verly instance, there is no showing that the Co-op knowingly waived or ignored its setback requirement. On the basis of the Co-op's statements and no contradictory evidence from Windpower,

the Commission finds that the Co-op was not aware at the time it interconnected the Verly wind tower that it did not comply with the 1.5 setback requirement. Subsequent to becoming aware of Verly violation due to Windpower's allegations, the Co-op has done nothing to waive enforcement of its setback requirement vis a vis the Verly wind tower.⁴ Consequently, there is no basis to conclude that the Co-op selectively and discriminatorily enforced its setback requirement against Windpower.

E. Where the QF Interconnected with the Co-op Without Permission and in Violation of the Co-op's Setback Requirement, Compensation for Electricity Supplied is Not Warranted

Windpower requested that the Commission order the Co-op to pay Windpower for the energy generated and supplied to the Co-op from the date of interconnection on October 9, 1992. However, the interconnection was effected by Windpower itself without the Co-op's permission and, in fact, contrary to the Co-op's expressed notification of its intent to enforce the setback requirement.⁵

Windpower's action in interconnecting itself with the Co-op's system without the Co-op's permission violated the process established by the Commission's rules. The Commission's rules make it clear that if a QF believes that a utility has improperly refused to interconnect with it the proper recourse is to appeal the reasonableness of the utility's action to the Commission. See Minn. Rules, parts 7835.4500 and 7835.5800. The QF has no authority to proceed on its own to effect the interconnection.

As it turns out, the Commission has found that the Co-op's refusal to interconnect with Windpower was essentially reasonable

⁴ The Commission does not comment in this Order regarding what steps the Co-op should take at this point with respect to enforcement of its setback requirement regarding the Verly wind tower given the circumstances of that particular case. Nor will the Commission speculate whether there are steps that Verly can take short of moving his wind tower that would warrant the Co-op in waiving its setback requirement in that particular case. That matter is simply not before the Commission at this time.

⁵ In its August 20, 1992 letter to Windpower, the Co-op stated that the 1.5 setback distance "...must be maintained!" and stated that the letter was being sent "...so the situation is corrected prior to further construction or installation." Despite these clear indications of intent to enforce the 1.5 setback requirement, Windpower proceeded on its own to interconnect its facility with the Co-op's system on October 9, 1993.

and authorized by Minn. Rules, part 7835.4800.⁶ This supports but is not essential to the finding that Windpower's action was improper. The rules prescribe appeals to the Commission in the event of impasse, not self-help interconnection by the QF.

In these circumstances, allowing Windpower to receive compensation as a direct result of its violation of established process it would undermine the balance of interests between utilities and QFs established by the Commission's rules. Accordingly, Windpower's request will be denied.

III. Summary of Commission Actions

The Commission finds that a 1.1 setback requirement is a reasonable technical operating specification for a wind generating QF within the meaning of Minn. Rules, part 7835.4800. This requirement is not discriminatory against QFs if it is applied in an even-handed manner to all wind towers in the Co-op's service territory.

Although the Co-op's current practice of incorporating the setback requirement into its uniform statewide contract by reference is sufficient, the Commission believes that it would be better practice to include such an important requirement in the main text of the standard contract. The Commission understands that the Co-op has agreed to amend its standard contract accordingly.

These findings and Commission action are consistent with Minn. Rules, part 7835.0200. The Commission gives maximum possible encouragement to cogeneration and small power production consistent with protection of ratepayers and the public. The 1.1 setback requirement will provide necessary protection for the Co-op's ratepayers and the public. At the same time, the benefit of such a setback requirement is not outweighed by discouragement to cogeneration and small power production.

IV. Attorneys' Fees

In its complaint, Windpower requested that the Commission order the Co-op to pay Windpower's reasonable costs and attorneys' fees. The award of attorneys' fees is governed by Minn. Stat. § 216B.164 (1992) and Minn. Rules, part 7835.4550.

⁶ Windpower's wind tower does violate the 1.1 setback requirement that the Commission has found reasonable. In addition, the Commission has found that the Co-op's enforcement of its 1.5 setback requirement did not discriminate against Windpower and its enforcement of a 1.1 setback requirement does not discriminate against Windpower as a QF.

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' FEES⁷ 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. The two-part procedure used in Hensley and Dakota-Winona requires 1) a determination by the Commission whether the plaintiff is a prevailing party eligible for reimbursement of attorneys' fees and then 2) a determination of what level of fee recovery is reasonable, based on the results obtained. 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 Windpower is not a prevailing party. None of Windpower's specific requests for relief have been granted. Although the Commission has reduced the size of the setback from 1.5 to 1.1, the revised setback still renders Windpower's wind tower out of compliance and, hence, ineligible for legitimate interconnection and payment for the electricity it is producing.

In short, having achieved no benefit in this matter, Windpower has failed to meet the threshold determination for recovery of attorneys' fees and its request for attorneys' fees will be denied.

ORDER

1. The Formal Complaint filed November 25, 1992 by Minnesota Windpower (Windpower) against the Lyon-Lincoln Electric Cooperative, Inc. (Lyon-Lincoln or the Co-op) is dismissed.

⁷ 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.

2. Windpower's request to be compensated for energy generated from the date it interconnected its facility with the Co-op's system is denied.
3. Windpower's request to recover attorneys' fees is denied.
4. Lyon-Lincoln shall modify its setback requirement to 1.1 times the height of the tower.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Susan Mackenzie
Acting Executive Secretary

(S E A L)