

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Central Iowa Power Cooperative  
Clarke Electric Cooperative, Inc.  
Consumers Energy Cooperative  
East-Central Iowa Rural Electric Cooperative  
Eastern Iowa Light & Power Cooperative  
Farmers Electric Cooperative, Inc.  
Guthrie County Rural Electric Cooperative Association  
Maquoketa Valley Electric Cooperative  
Midland Power Cooperative  
Pella Cooperative Electric Association  
Rideta Electric Cooperative, Inc.  
South Iowa Municipal Electric Cooperative Association  
Southwest Iowa Service Cooperative  
T.I.P. Rural Electric Cooperative

Docket No. EL03-219-001

ORDER DENYING REHEARING

(September 22, 2004)

1. On August 8, 2003, Central Iowa Power Cooperative (CIPCO) and its 12 Members<sup>1</sup> (collectively, Petitioners) filed a petition pursuant to section 292.402 of the Commission's regulations, 18 C.F.R. § 292.402 (2004), for a waiver of the Commission's regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). 16 U.S.C. § 824a-3 (2000). Specifically, the Members sought waiver of their obligations under section 292.303(a) of the Commission's regulations, 18 C.F.R. § 292.303(c) (2004), to purchase power directly from qualifying facilities (QFs), and

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<sup>1</sup> Central Iowa Power Cooperative; Clarke Electric Cooperative, Inc.; Consumers Energy Cooperative; East-Central Iowa Rural Electric Cooperative; Eastern Iowa Light & Power Cooperative; Farmers Electric Cooperative, Inc.; Guthrie County Rural Electric Cooperative Association; Maquoketa Valley Electric Cooperative; Midland Power Cooperative; Pella Cooperative Electric Association; Rideta Electric Cooperative, Inc.; South Iowa Municipal Electric Cooperative Association; Southwest Iowa Service Cooperative; and T.I.P. Rural Electric Cooperative.

CIPCO sought waiver of its obligations under section 292.303(b) of the Commission's regulations, 18 C.F.R. § 292.303(b) (2004), to sell directly to QFs. On November 19, 2003, the Commission issued an order (November 19 Waiver Order) denying the petition for waiver.<sup>2</sup> Petitioners now request rehearing. For the reasons given below, we will deny the request for rehearing.

## Background

2. Petitioners are nonregulated electric utilities.<sup>3</sup> CIPCO is an electric generation and transmission cooperative that currently has 14 Members.<sup>4</sup> The Members are obligated to purchase all of their power from CIPCO pursuant to long-term wholesale power contracts.

3. In their original filing, Petitioners attached to their request for waiver a document entitled "Public Utilities Regulatory Policy Act of 1978 Section 210 Implementation Plan" (Implementation Plan). The Implementation Plan provides that CIPCO and its Members will permit QFs to interconnect with the transmission system of CIPCO or any of its Members, and will permit such QFs to sell energy and capacity at rates equal to CIPCO's full avoided cost. In addition, Petitioners agreed to permit QFs to purchase supplemental, back-up and maintenance power from a Member on either a firm or interruptible basis.

4. Petitioners contended that the Implementation Plan supports a waiver of the Members' purchase obligation because QFs will be provided with at least the same revenue and the same encouragement that they would have obtained by selling power directly to the Members. Petitioners further contended that the Implementation Plan made appropriate a waiver of CIPCO's sale obligation because the Members are prepared to "stand in the shoes" of CIPCO by providing QFs with retail service.

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<sup>2</sup> *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003) (November 19 Waiver Order).

<sup>3</sup> Section 3(9) of PURPA defines a "nonregulated" utility as any utility other than a state regulated electric utility. 16 U.S.C. § 2602(a) (2002). Petitioners are thus unregulated to the extent that Iowa has not regulated them.

<sup>4</sup> The 14 Members consist of 13 rural electric cooperatives and one municipal cooperative. In addition to the 12 rural electric cooperative Members identified in footnote 1, Linn County Rural Electric Cooperative (Linn) is also a member of CIPCO. Linn has chosen not to participate in this filing.

5. Petitioners asserted that while the Implementation Plan provided that the amount of energy and capacity purchased from the QF by CIPCO shall not be netted against the energy and capacity purchased by the QF from the Member, the Cooperatives claimed that the intention of the Implementation Plan was not to avoid any obligation to net meter or net bill. Instead, Petitioners maintained that neither PURPA nor the regulations thereunder require the Cooperatives to offer net metering. Petitioners also stated that if such a requirement is imposed through amendments to said regulations or pursuant to rules and regulations adopted by entities having jurisdiction over CIPCO and its Members, the Implementation Plan provides such rules and regulations will be followed.

6. Mr. Gregory Swecker and Mrs. Beverly Swecker responded separately to Petitioners' Petition for Waiver. Mr. Swecker and his wife Beverly are farmers who bought a 65kW wind generator in 1998. The Sweckers and Midland had been unable to agree on terms and conditions for interconnection and rates related to Mr. Swecker's QF and the wind generator remains unconnected and unused. The Sweckers argued essentially that CIPCO's waiver request should be denied because Petitioners had been violating the spirit of PURPA by not encouraging small power production. Rather, the Sweckers argued that Petitioners had been deliberately difficult and uncompromising in their interactions with small QFs that wish to interconnect with CIPCO's transmission system.

### **November 19 Waiver Order**

7. In the November 19 Waiver Order denying the request for waiver, we noted that in enacting PURPA Congress sought in part to encourage the development of cogeneration facilities and small power production facilities. In order to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities, section 210(a) of PURPA required that the Commission prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring electric utilities to purchase electricity from QFs.

8. Petitioners sought a waiver under section 292.402, which provides that a non-regulated utility, after giving public notice in the area served by it, may apply for a waiver of the Commission's regulations implementing PURPA. That regulation provides that such a waiver will be granted only if the waiver applicant:

demonstrates that compliance with any of the requirements of [the regulation] is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.<sup>5</sup>

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<sup>5</sup> 18 C.F.R. § 292.402(b) (2004).

9. We found that petitioners had not demonstrated that compliance with the utility purchase obligation is not necessary to encourage cogeneration and small power production or is not otherwise required under section 210 of PURPA. The mandate of section 210 of PURPA is to encourage cogeneration and small power production. The Commission attempted to implement that mandate by prescribing rules with the specific purpose of avoiding situations where QFs are required to go through complex procedures simply to sell electricity to an interconnected utility. We found that when individuals such as Mr. Swecker are forced to endure years of litigation before being permitted to sell their QF output, we are unable to make the requisite finding, *i.e.*, that our regulations governing arrangements between QFs and electric utilities are not necessary to encourage cogeneration and small power production in Petitioner's service area.

10. The November 19 Waiver Order noted that we were particularly concerned with the strategy of CIPCO, as demonstrated by its member Midland, to fight vigorously a QF's right to sell rather than negotiate with the QF in good faith. We also stated that we were disturbed by Midland's arguing to us that its dispute with Mr. Swecker should be resolved in state fora, and then arguing in state fora that PURPA preempted the state legislature from requiring Midland to enter into a net metering arrangement. The November 19 Waiver Order stated that Midland should have raised the PURPA preemption issue before this Commission when the Swecker case was before the Commission previously, because this Commission has the primary responsibility for interpreting PURPA in the first instance. In an order issued concurrently with that order, addressing the Swecker's renewed effort to have the Commission initiate an enforcement proceeding against Midland, we ruled that PURPA does not preempt a state legislature from requiring net metering arrangements, even if the state legislature has provided that certain utilities' rates are not otherwise to be regulated by the State Commission.<sup>6</sup>

### **Requests for Rehearing**

11. Petitioners request rehearing, arguing that the Commission erred in the November 19 Waiver Order by failing to approve CIPCO's PURPA waivers because identical waivers have been approved for similarly situated cooperatives. Petitioners assert that courts have consistently upheld the ability of cooperatives to implement PURPA in accordance with the decisions of their governing bodies (*i.e.*, their Boards of Directors), and Petitioners assert that such waivers have previously been given to other electric cooperatives such as Oglethorpe Power Corporation, Seminole Electric Cooperative, Soyland Power Cooperative, Corn Belt Power Cooperative, Southern Illinois Power Cooperative and Northwest Iowa Power Cooperative. Petitioners assert that the November 19 Waiver Order does not point to a single deficiency in the filed

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<sup>6</sup> See *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (November 19 Enforcement Order).

tariff, power purchase sale contract, or other terms and conditions included in the Implementation Plan. Petitioners also assert that some of the same objections raised by the Sweckers were previously considered and rejected.<sup>7</sup>

12. Petitioners also assert that the November 19 Waiver Order has no basis for denying the waiver request in part because of alleged bad faith on the part of CIPCO and its member Midland in its dealings with the Sweckers. Petitioners assert that such a conclusion ignores the record, which demonstrates that Mr. Swecker has consistently sought rates in excess of avoided costs and other concessions not supported by PURPA, and that CIPCO and Midland had no choice but to defend their members' interests.

13. Petitioners also assert that the November 19 Waiver Order appears to deny CIPCO its desired waiver in part because it has not agreed to provide Mr. Swecker with a net metering arrangement. They assert that results of litigation in state fora are directly contrary to the Commission's apparent aim, and that every court or regulatory authority that has addressed this issue has concluded that Iowa law does not require non-rate regulated electric cooperatives to adopt net metering. Petitioners also assert that there is also no requirement under PURPA or the Commissions' own implementing regulations to adopt net metering.

### **Other Pleadings**

14. Three individuals, Mr. Bruce Bannister, Mr. John W. McGregor and Ms. Doris McGregor (Protestors), filed an apparent joint protest to the Petitioners' request for rehearing. Protestors argue that while one of Petitioners' main arguments is that the Commission has granted waivers to other rural electric cooperatives in the past, these waivers were the result of misrepresentations and misstatements, specifically that waivers would not discourage the development of renewable energy. Protestors argue that by focusing its comments on the Sweckers, CIPCO is attempting to divert attention from cooperatives that are attempting to avoid the requirements of PURPA.

### **Discussion**

15. We will deny the request for rehearing. The mandate of section 210 of PURPA is to encourage cogeneration and small power production. A waiver will be granted only if the waiver applicant:

demonstrates that compliance with any of the requirements of [the regulation] is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.<sup>8</sup>

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<sup>7</sup> See *Oglethorpe Power Corp.*, 32 FERC ¶ 61,103 (1985) (*Oglethorpe I*), *reh'g granted in part and denied in part*, 35 FERC ¶ 61,069 (1986) (*Oglethorpe II*).

16. We found, and we see no reason to change that determination at this time, that when individuals such as Mr. Swecker are forced to endure years of litigation before being able to sell QF output to an interconnected utility such as Midland, we are unable to make the requisite finding, *i.e.* that our regulations governing arrangements between electric utilities and QF's are not necessary to encourage cogeneration and small power production in Petitioners' service area.

17. In their request for rehearing, Petitioners list numerous examples of what they claim to be examples of waivers being granted under similar circumstances. However, the circumstances were not similar. None of those cases presented such a clear example of a utility using every means at its disposal to avoid making purchases from QFs. In short, Midland's actions actively discouraged QF development, contrary to the requirements of PURPA.

18. The Petitioners also argue that the Commission erred in the November 19 Waiver Order by concluding that CIPCO and its Members had not engaged in good faith dealings with Mr. Swecker. The Commission is cognizant that there are two points of view in every conflict. Nevertheless, the facts viewed as whole indicate a resistance on the part of Midland to allowing Mr. Swecker to interconnect and sell power. By arguing to the Commission that their dispute with Mr. Swecker should be resolved in state fora, and then arguing in state fora that PURPA preempted the state legislature from requiring Midland to enter into a net metering arrangement, Petitioners attempted to create a situation where the Sweckers would have no forum in which to bring their concerns regarding net metering.

19. Petitioners also assert that the November 19 Waiver Order errs by denying the desired waivers because CIPCO's PURPA implementation plan does not include net metering. Petitioners claim that Iowa law does not require net metering for non-rate regulated utilities like Midland. However, on July 21, 2004, the Iowa Supreme Court ruled that net metering must be used by Midland in settling accounts between the company and its cogenerating customers.<sup>9</sup> The court held that net metering is appropriate because it maximizes the incentive for cogeneration.

20. Petitioners also misunderstand our earlier statements regarding net billing. The Commission has never claimed that PURPA requires net billing. In the November 19 Waiver Order, we were concerned that arguments were being made that PURPA preempted the state legislature from requiring Midland to enter into a net metering

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<sup>8</sup> 18 C.F.R. § 292.402(b) (2003).

<sup>9</sup> *Windway Technologies, Inc.; Welch Motels, Inc.; Gregory Swecker; and Beverly Swecker vs. Midland Power Cooperative*, 2004 Iowa Sup. LEXIS 213 (2004).

arrangement. We found in *MidAmerican Energy Company*, 94 FERC ¶ 61,340 (2001), that net billing is consistent with PURPA. In the November 19 Enforcement Petition Order, we found that PURPA does not preempt a state legislature from requiring a utility that is otherwise unregulated to net meter. It is the state legislature that decides whether, and to what extent, a utility is regulated.<sup>10</sup> And, as noted above, the Iowa Supreme Court has held that Midland is subject to the Iowa net metering requirements.

21. As we noted in the rehearing of the November 19 Enforcement Petition Order issued on September 21, 2004,<sup>11</sup> the parties to that proceeding entered into a settlement agreement after years of protracted litigation. We hope that this represents a change in the treatment that Iowa QFs will receive from CIPCO and its Members. Accordingly, our earlier denial of waiver and our action here reaffirming our denial of waiver, were and are without prejudice to CIPCO and its Members refiling for waiver in a new proceeding. Such new request for waiver must reflect a willingness to accommodate QFs as well as an amended Implementation Plan that provides for net metering.

The Commission orders:

The request for rehearing is hereby denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>10</sup> *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,320 at P 22 (2003).

<sup>11</sup> *Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 (2004).