

137 FERC ¶ 61,200
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Gregory R. Swecker and Beverly F. Swecker

v.

Docket No. EL11-39-001

Midland Power Cooperative and State of Iowa

ORDER FINDING DISCONNECTION INCONSISTENT WITH THE
REQUIREMENTS OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF
1978

(Issued December 15, 2011)

1. In this order, the Commission finds, as discussed below, that the actions of Midland Power Cooperative (Midland), in disconnecting service to the qualifying facility (QF) owned by Gregory R. Swecker and Beverly F. Swecker (Sweckers), are inconsistent with its obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission also finds that the underlying dispute concerning Midland's determination of its avoided costs for purchasing the output of QF owned by the Sweckers is appropriate for resolution through a settlement process; if the parties are unable to report progress within thirty days of the date of this order towards a settlement of the underlying dispute, the Commission will consider what steps to take next in this proceeding.

I. Background

A. History of Dispute

2. The history of the relationship between Mr. Swecker and Midland is long and contentious. We summarize it briefly here.¹

¹ More details of this relationship are contained in prior Commission orders addressing Mr. Swecker's prior petitions for enforcement under section 210(h) of PURPA, summarized below, as well as in an order addressing the request by Central Iowa Power Cooperative (CIPCO), the generation and transmission cooperative of which Midland is a member, and by thirteen of its members for a waiver of the Commission's regulations implementing PURPA, also summarized below.

3. In 1998, Mr. Swecker, a retail customer of Midland, bought a 65kW wind generator for his farm; that generator is a qualifying small power production facility. Mr. Swecker and Midland have battled since then over various issues relating to the financial arrangements between Midland and the QF. The first dispute related to what the connection charge would be for his QF; Midland sought to charge Mr. Swecker its standard interconnection charge for QF service, while Swecker claimed to be entitled to be charged the lower residential/farm charge. In the course of this dispute Midland disconnected Mr. Swecker's electric service for nonpayment. In response, Mr. Swecker, in early 1999, in Docket No. EL99-41-000, filed his first petition asking the Commission to require Midland to provide service to his farm at the residential/farm rate and to award damages. The Commission declined to initiate an enforcement action against Midland.²

4. Mr. Swecker brought his dispute with Midland back to the Commission in October 2000, in Docket No. EL01-12-000. Mr. Swecker claimed that Midland had incorrectly calculated its avoided cost rate payable to QFs. Mr. Swecker alleged that Midland's actual avoided cost was much higher than the rate Midland offered to pay. Mr. Swecker requested the Commission to compel Midland to provide any and all data from which Midland's avoided costs might be derived. Mr. Swecker, while his petition was pending before this Commission, filed a request to pursue the matter in a judicial forum. Because both of the parties expressed a desire to pursue the matter in court, the Commission dismissed the petition to allow Mr. Swecker to file in an appropriate court.³

5. Mr. Swecker brought his dispute with Midland to the Commission again in 2003, in Docket No. EL03-53-000.⁴ Mr. Swecker stated that he had brought the dispute back to the Commission because Midland had previously argued to this Commission that the case should be decided in a state forum and, when the dispute was in a state forum, argued that the dispute was preempted by PURPA and could not be decided by the state. Mr. Swecker stated that, because the state courts ruled that they lacked jurisdiction, he had returned to the Commission with his request that the Commission require Midland to

² *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 (1999) (1999 Order).

³ *Gregory & Beverly Swecker v. Midland Power Cooperative*, 96 FERC ¶ 61,085 (2001).

⁴ On June 3, 2003, Mr. Swecker amended his complaint by expressing opposition to what was then an anticipated request by CIPCO for a waiver of certain regulations implementing PURPA. CIPCO's request was for a waiver for both itself and its members, including Midland. This separate, yet related, issue was addressed in Docket No. EL03-219-000, where the Commission denied CIPCO's request for waiver of the requirements of PURPA. *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004).

fulfill its obligation to purchase power from his QF at Midland's avoided cost rate and to sell him supplemental and backup power.

6. The Commission initially granted Mr. Swecker's 2003 petition for enforcement under section 210(h) of PURPA.⁵ However, the Commission also encouraged the parties to attempt to settle the matter before the Commission filed its enforcement petition in Federal court.

7. Midland filed what it labeled a request for rehearing and vacatur of the November 19 Enforcement Petition Order. The National Rural Electric Cooperative Association (NRECA) also filed for rehearing. Subsequently, Mr. Swecker and Midland entered into a Settlement Agreement. The Commission approved the Settlement Agreement, dismissed the requests for rehearing as moot, and declined to vacate the November 19 Enforcement Petition Order as requested by Midland in its request for rehearing.⁶

8. A few months later, however, Mr. Swecker once again filed a petition for enforcement under section 210(h) of PURPA. In the April 6, 2005 petition, in Docket No. EL05-92-000, Mr. Swecker requested that Midland purchase power from Mr. Swecker at the price at which Midland purchases power from CIPCO, Midland's power supplier; Mr. Swecker asserted this price constitutes Midland's avoided cost. Mr. Swecker also requested that the sale from his QF to Midland be billed with net data collected from a single meter (instead of from the two meters proposed by Midland) and stated that such net metering is appropriate because it is a simple way to determine the kilowatts that are available for sale from the QF. Mr. Swecker requested that the Commission undertake an enforcement proceeding to require Midland to provide Mr. Swecker net metering.

9. In an order in Docket No. EL05-92-000, the Commission granted Mr. Swecker's petition for enforcement. The Commission found that, on the record before it, Midland should provide net metering.⁷ The Commission subsequently granted reconsideration of the June 6 Order.⁸ The Commission found that, following the issuance of the June 6

⁵ *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (November 19 Enforcement Petition Order).

⁶ *Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 (2004).

⁷ *Gregory Swecker*, 111 FERC ¶ 61,365, at P 45-46 (2005) (June 6 Order).

⁸ *Gregory Swecker v. Midland Cooperative*, 114 FERC ¶ 61,205 (2006).

Order, the Energy Policy Act of 2005 was enacted, and that it was now clear that net metering was not required by PURPA.⁹

B. The Current Proceeding

10. The instant proceeding began on May 6, 2011, with the Sweckers' filing, in Docket No. EL11-39-000, a petition to enforce PURPA against Midland and the State of Iowa. The Sweckers claimed that Midland has refused to purchase the excess electric energy produced by the Swecker QF at Midland's full avoided cost. The Sweckers asked the Commission to declare that the full avoided cost rate is the rate that Midland pays its full-requirements supplier for energy and power. The Sweckers also asked the Commission for payment of energy and capacity that has been delivered to Midland from 2004 to April 1, 2011, at the rate the Sweckers claim is the proper avoided cost rate. Finally, the Sweckers asked that Midland be prohibited from disconnecting its QF until all violations and complaints have been resolved.

11. In response to the May 6, 2011 filing of the Sweckers' petition to enforce PURPA, the Commission issued a notice of intent not to act.¹⁰

12. Shortly following issuance of the notice of intent not to act in this proceeding, Midland disconnected the Swecker QF. On October 27, 2011, the Sweckers filed a notice of that disconnection and a request for an expedited order for reconnection. On October 31, 2011, the Sweckers filed a second request for expedited order for reconnection.

13. Notice of the Sweckers' October 27 and October 31, 2011 filings were published in the *Federal Register*, 76 Fed. Reg. 69,719, with interventions and protests due on or before November 8, 2011.

14. Midland filed an answer to the Sweckers' October 27 and October 31 pleadings. Midland states that the Commission has already issued a notice of intent not to act in this proceeding and has denied reconsideration of that notice. Midland claims that the October 27 and 31 pleadings are really additional requests for reconsideration. Midland

⁹ *Id.* In addition, on December 27, 2005, Mr. Swecker filed two petitions for enforcement pursuant to section 210(h) of PURPA. In Docket No. EL06-35-000, Mr. Swecker asked the Commission to initiate an enforcement proceeding against Grand Junction Municipal Utilities. In Docket No. EL06-36-000, Mr. Swecker asked the Commission to initiate another enforcement proceeding against Midland. The Commission denied these two additional requests to enforce PURPA in the order granting reconsideration of the June 6 Order. *Id.*

¹⁰ *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 136 FERC ¶ 61,085, *reconsideration denied*, 137 FERC ¶ 61,035 (2011).

states that the Sweckers are repeating their claim that they should receive Midland's average wholesale power rate of 6.37 cents per kWh; rather than the 3.5845 cents per kWh avoided cost rate set by Midland, which Midland states complies with Commission precedent. Midland argues that disconnection is a matter of state law, it has followed the applicable state rules for disconnection, and the Commission should stay out of the disconnection issue. Midland further argues that if the Commission finds that its disconnection of the Sweckers raises PURPA issues, the Commission will be encouraging its customers to raise PURPA issues as a method to avoid disconnection.

15. On November 6, 2011, Jason Delp filed comments on the Sweckers' request for an order requiring reconnection. Mr. Delp states that the Swecker case demonstrates that if the private sector tries to use renewable energy sources, the utilities will use everything available to prevent the private sector from doing so. Mr. Delp claims the issue is not whether the Commission should order Midland to reconnect the Sweckers' QF and residence, but why the Commission is not exercising its enforcement authority to protect the Sweckers against the utility's bullying tactics.

16. On November 8, 2011, Tyler McNeal of WindWay Technologies, Inc. (Windway) filed comments on the Sweckers' request for reconnection. Mr. McNeal states that Windway sold and installed the 65 kW wind turbine to the Sweckers. Mr. McNeal states that Midland and rural electric cooperatives "have scoffed at FERC and have not obeyed PURPA." Mr. McNeal states that while it is federal and state policy to encourage renewable energy sources, the law is not upheld, and rural electric cooperatives effectively steal power from renewable resources; this, he says, discourages the development of renewable resources.

17. On November 8, 2011, Weldon L. Coldiron, of Pleasanton, Texas, filed comments in support of the Sweckers' request for reconnection. Mr. Coldiron argues that by issuing a notice of intent not to act the Commission is not doing its job and is passing on its dirty work to the Federal court system. Mr. Coldiron argues that if the Commission had ruled on the avoided cost issue raised by the Sweckers, disconnection would not now be an issue. Mr. Coldiron argues that the Commission's issuance of a notice of intent not to act is a tactic "designed to inhibit the rights of the QF." This tactic, he argues, guarantees an unfair advantage to utilities over small QFs.

18. On November 8, 2011, the Original Green Organization filed comments in support of the Sweckers. The Original Green Organization argues that his case demonstrates that the Commission's rules against unfair methods of competition are not working. The Original Green Organization argues that utilities have the knowledge that it is not economical to enforce the rights of small QFs in court and that therefore utilities, such as Midland, engage in anti-competitive conduct despite the clear language of PURPA, which it argues is intended to prohibit actions such as those taken by Midland.

19. On November 8, 2011, Bob Welch of Welch Motels filed comments in support of the Sweckers' request for reconnection. Mr. Welch urges the Commission to take a greater role in the enforcement of PURPA against a nonregulated electric utility such as

Midland. Mr. Welch states that nonregulated electric utilities count on the Commission issuing a notice of intent not to act when presented with a petition for enforcement of PURPA with the knowledge that it is not cost effective for a small QF to pursue its enforcement claims in Federal court. Mr. Welch states that Welch Motels also has disputes with Midland concerning the implementation of PURPA.

20. On November 10, 2011, the Sweckers filed a pleading seeking data from Midland justifying its calculation of its avoided costs.

21. On November 14, 2011, the Sweckers filed another request for the Commission to expedite its consideration of the Sweckers' request for an order requiring Midland to reconnect. In the November 14 pleading, the Sweckers repeated their request for data.

22. On November 14, 2011, Midland filed a letter alleging that it has already supplied the Sweckers with the data the Sweckers are requesting.

23. On November 16, 2011, United States Senator Charles E. Grassley filed a letter with the Commission providing some documentation provided by Ms. Beverly Swecker, and requesting the Commission provide assistance to Ms. Swecker.

24. On December 9, 2011, the Sweckers filed a pleading describing an incident of Midland trespassing and locking the Sweckers' disconnect switch without permission. The Sweckers stated that the overhead fuses, which had been previously removed to shut off electrical service to the Swecker QF and residence, were replaced and a lock was placed on the disconnect switch owned by the Sweckers. The Greene County Sheriff was called and, according to the Sweckers, Midland admitted that the disconnect switch was property owned by the Sweckers. Midland's crew, in the presence of the Greene County Sheriff, removed the lock on the disconnect switch owned by the Sweckers and Midland again removed the overhead fuses.

25. The Sweckers also state that they were told by Midland's general manager that Midland had entered the Swecker property to read the meter, but the Sweckers questioned this explanation because backup power from Midland has been disconnected for over 45 days. Midland's general manager, the Sweckers state, also told the Sweckers that the Commission, by issuing its notice of intent not to act, had ruled in Midland's favor in this proceeding and that, to be reconnected, the Sweckers needed to pay Midland the amount Midland claims it is owed.

26. On December 12, 2011, Midland filed a letter in response to the Sweckers' December 9, 2011 filing which alleged impermissible trespassing and padlocking of Sweckers' disconnection switch. Midland argues the disconnection actions were permitted by the Iowa Utilities Board (IUB) and were within the IUB's jurisdiction. Midland states its actions met the relevant notice requirements before the disconnection, and also that the padlocking of the disconnection switch was permissible under the IUB regulations. Midland further states its actions in disconnecting service and with securing the disconnection switch were proper under the provisions of its contract with the

Sweckers, and the Sweckers can achieve reconnection by paying their bill. Midland states that the Sweckers allege they do not owe Midland money, rather the Sweckers believe Midland owes the Sweckers payments, because of the Sweckers' incorrect premise for determining avoided costs. Midland requests the Commission reject the Sweckers' arguments and uphold the notice of intent not to act.

27. On December 13, 2011, the Sweckers filed an answer to Midland's December 12, 2011 pleading.

Discussion

28. As discussed below, we find Midland's disconnection of the Sweckers' QF to be inconsistent with its obligations under PURPA.

29. Under section 210(a) of PURPA,¹¹ Midland has an obligation to purchase electric energy from QFs and to sell electric energy to QFs. The Commission has addressed that obligation in section 292.303(a) (obligation to purchase from QFs),¹² section 292.303(b) (obligation to sell to QFs),¹³ and section 292.303(c) (obligation to interconnect with QFs) of its regulations.¹⁴

30. Section 292.303(a) provides:

Each electric utility shall purchase, in accordance with § 292.304, unless exempted by §292.309 and § 292.310, any energy and capacity which is made available from a qualifying facility ...

31. Section 292.303(b) provides:

Each electric utility shall sell to any qualifying facility, in accordance with §292.305, unless exempted by § 292.312, energy and capacity required by the qualifying facility.

32. Exemptions to the statutory purchase obligation are limited. One exemption is that a utility can be relieved of its QF purchase obligation under section 210(m) of

¹¹ 16 U.S.C. § 824a-3(a) (2006).

¹² 18 C.F.R. § 292.303(a) (2011).

¹³ 18 C.F.R. § 292.303(b) (2011).

¹⁴ 18 C.F.R. § 292.303(c) (2011).

PURPA, 16 U.S.C. § 824a-3(m) (2006).¹⁵ This provision is not at issue here, as Midland has not claimed relief under section 210(m), nor filed a petition seeking section 210(m) of PURPA relief pursuant to sections 292.309 and 292.310 of the Commission's regulations.

33. Another exemption to the QF purchase obligation is contained in the Commission's regulations at 18 C.F.R. § 292.304(f)(1), which provides, with certain limitations, that a utility is not required to purchase energy or capacity from a QF "during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."

34. In Order No. 69, which implemented section 292.304(f) of the Commission's regulations, the Commission stated that this section was intended to deal with a certain condition that can occur during light loading periods, in which a utility operating only base load units would be forced to cut back output from the units in order to accommodate the unscheduled QF energy purchases.¹⁶ The Commission stated that such base load units might not be able to increase their output levels rapidly when the system demand later increased, resulting in the utility needing to rely upon less efficient, higher cost units.¹⁷ Section 292.304(f) of the Commission's regulations, when read in conjunction with the relevant explanation in Order No. 69, applies only to such low loading scenarios, and cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons.

35. Moreover, many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided cost rates that are determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the

¹⁵ Section 210(m) of PURPA was implemented in 18 C.F.R. §§ 292.309, 310 (2011), which are the exemptions to the purchase obligation referred to in section 292.303(a).

¹⁶ *Small Power Production & Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870, 30,886 (1980).

¹⁷ *Id.* at 30,886.

utility authorized to curtail the QF purchase unilaterally. Again, these considerations mean that section 292.304(f) of the Commission's regulations is inapplicable to the case before us.

36. The final exemption from the obligation to purchase is contained in section 307(b) of the Commission's regulations, 18 C.F.R. § 292.307(b), which provides that a utility may, during a system emergency, discontinue purchases from a QF if such purchases would contribute to such emergency. Section 101(b)(4) of the Commission's regulations, 18 C.F.R. § 292.101(b)(4), defines "system emergency" as "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." No claim has been made that a system emergency exists that justifies Midland's discontinuance of purchases from the Sweckers' QF.

37. Because Midland, by disconnecting the Sweckers' QF from its system, has effectively ceased purchases from the Sweckers' QF, and because its justification for the disconnection and cessation of purchases does not fall within any of the exemptions to the purchase obligation, we find that Midland's disconnection action is inconsistent with its purchase obligation under PURPA and our regulations.

38. We turn next to Midland's obligation to sell to the Sweckers' QF. The obligation to sell to a QF is comprehensive under PURPA and our regulations. The only exemption to the obligation to sell in PURPA is contained in section 210(m), which provides for an exemption from the obligation to sell only upon a Commission finding of certain retail competition, or a Commission finding that the electric utility is not required by State law to sell electric energy in its territory.¹⁸ In either case, cessation of sales to a QF requires an application to the Commission. Midland has not applied for relief from the obligation to sell to the Sweckers' QF. We accordingly find that Midland still has the obligation to sell capacity and energy to the Sweckers' QF and that the disconnection is inconsistent with that obligation.

39. That said, it may be that there are circumstances where failure to pay a bill will justify disconnection. In the circumstances presented here, however, where the electric utility is being accused of violating PURPA, we believe that disconnection should not occur without following the Commission's regulations for authorization to be relieved of the obligation to sell to the QF. Here, where the Sweckers have indicated that they intend to pursue the matter in Federal court, we do not believe disconnection is justified, but must wait for the conclusion of the Sweckers' enforcement action under PURPA, including the conclusion of any petition for enforcement filed in Federal court.

40. Midland has implied that the Commission, by issuing a notice of intent not to act in this proceeding, has found that Midland is correct on the merits. That implication is

¹⁸ 16 U.S.C. §§ 824(a)-3(m)(5) (2006); 18 C.F.R. § 292.312 (2011).

incorrect. In issuing the notice of intent not to act in this proceeding, the Commission was not making a ruling on the merits. The Commission has enforcement authority under section 210(h)(2) of PURPA when a State commission's (or, as in the case before us, a nonregulated electric utility's) implementation of PURPA is "inconsistent or contrary to the Commission's regulations."¹⁹ Section 210(h)(2)(B) of PURPA²⁰ permits any qualifying small power producer, among others, to petition the Commission to act under section 210(h)(2)(A) of PURPA²¹ to enforce the requirement that a State commission, or nonregulated electric utility, implement the Commission's regulations. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."²² If the Commission does not undertake an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(A) of PURPA, the petitioner then may bring its own enforcement action directly against the state regulatory authority or nonregulated electric utility in the appropriate United States district court.²³ The Commission's notice of intent not to act in this case, which was not accompanied by a declaratory order, was merely a procedural order telling the Sweckers that the Commission at that time did not intend to go to court on their behalf, and that they had the right to go to court themselves.

41. We do not here weigh in on the merits of the dispute between the Sweckers and Midland. We believe that rather than having the Commission at this time readdress the Sweckers' petition for enforcement and address the merits of the avoided cost issues raised in the petition in this docket, the parties may prefer to attempt to settle the avoided cost issue. We will direct the Commission's Dispute Resolution Service to convene the parties to see if assisted negotiations may result in an agreement.

42. If the parties are unable to reach an agreement, or make progress towards an agreement, within thirty days of the date of this order, the Commission will then decide what steps it will take next in this proceeding.

¹⁹ *1983 Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,644 (1983) (1983 Policy Statement).

²⁰ 16 U.S.C. §§ 824a-3(h)(2)(B) (2006).

²¹ 16 U.S.C. §§ 824a-3(h)(2)(A) (2006).

²² 1983 Policy Statement, 23 FERC at 61,645.

²³ 16 U.S.C. §§ 824a-3(h)(2)(B) (2006). The Commission may intervene in such a district court proceeding as a matter of right. *Id.*

The Commission orders:

(A) Midland shall reconnect with the Sweckers' QF for purposes of purchasing from and selling to the QF.

(B) The Commission's Dispute Resolution Service shall convene the parties, in accordance with the discussion in the body of this order.

(C) The Commission's Dispute Resolution Service shall report to the Commission within 10 days of the date of this order whether its offer to assist the parties in negotiations has been accepted.

(D) The Commission's Dispute Resolution Service, if it is assisting the parties, is directed to report the status of the negotiations within 30 days of the date of this order; if the parties have rejected the Commission's Dispute Resolution Service's offer of assistance, the parties are directed to report the status of any negotiations within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.