142 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gregory R. Swecker and Beverly F. Swecker

v. Docket No. EL11-39-002

Midland Power Cooperative and State of Iowa

ORDER DENYING REQUESTS FOR REHEARING AND RENEWING NOTICE OF INTENT NOT TO ACT

(Issued March 21, 2013)

1. In this order we deny rehearing of the Commission's December 15, 2011 order in this proceeding.[1] In the December 15 Order, the Commission found 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), were inconsistent with Midland's obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA)[2]. Nothing raised on rehearing warrants a change to that finding.

2. In the December 15 Order, the Commission also found that the underlying dispute concerning Midland's determination of its avoided costs for purchasing the output of the QF owned by the Sweckers was appropriate for resolution through a settlement process; the Commission stated that, if the parties were unable to report progress towards a settlement of the underlying dispute, the Commission would consider what steps to take next in this proceeding. In this order, in the absence of a settlement, we renew our earlier decision in this proceeding to give notice of our intent not to act.

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[1] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200 (2011) (December 15 Order).

[2] 16 U.S.C. § 824a-3 (2006).

Background

History of Dispute

3. The history of the relationship between the Sweckers and Midland is long and contentious. We summarized that history in the December 15 Order, noting that more details of the relationship could be found in prior Commission orders. We re-summarize the facts and circumstances here for the convenience of the reader.

4. In 1998, Mr. Swecker, a retail customer of Midland, bought a 65kW wind generator for his farm; that generator is a small power production QF. 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.[3]

5. 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.[4]

6. Mr. Swecker brought his dispute with Midland to the Commission again in 2003, in Docket No. EL03-53-000.[5] Mr. Swecker stated that he had brought the dispute back to

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[3] *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 (1999).

[4] *Gregory Swecker v. Midland Power Cooperative*, 96 FERC ¶ 61,085 (2001).

[5] On June 3, 2003, Mr. Swecker amended his complaint by expressing opposition to what was then an anticipated request by Central Iowa Power Cooperative (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

(continued…)

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

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

8. Midland filed what it labeled a request for rehearing and vacatur of the 2003 Enforcement Petition Order. The National Rural Electric Cooperative Association (NRECA) also filed for rehearing. Subsequently, Mr. Swecker and Midland entered into a settlement agreement.[7] The Commission approved the 2004 Settlement Agreement, dismissed the requests for rehearing as moot, and declined to vacate the 2003 Enforcement Petition Order as requested by Midland in its request for rehearing.[8]

9. 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 and to require Midland purchase power from Mr. Swecker at the price at which Midland purchases power from CIPCO.

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for waiver of the requirements of PURPA. *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004).

[6] *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (2003 Enforcement Petition Order).

[7] We refer to the settlement agreement as the 2004 Settlement Agreement.

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

10. In an order in Docket No. EL05-92-000, the Commission granted Mr. Swecker's petition for enforcement.[9] The Commission found that, on the record before it, Midland should provide net metering The Commission also found that in the context of the Swecker/Midland dispute, where the price of excess power had already been agreed to, net metering is the most appropriate means to ensure that Midland complies with the mandates of PURPA. The Commission subsequently granted reconsideration of the 2005 Order.[10] The Commission found that, following the issuance of the 2005 Order, the Energy Policy Act of 2005 was enacted,[11] and that it was now clear that net metering was not required by PURPA.[12]

The Current Proceeding

11. 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.

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[9] *Gregory Swecker*, 111 FERC ¶ 61,365, at P 45-46 (2005) (2005 Order).

[10] *Gregory Swecker*, 114 FERC ¶ 61,205, *order denying reconsideration*, 115 FERC ¶ 61,084 (2006) (2006 Order).

[11] Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005) (EPAct 2005).

[12] *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. Secondly, 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 2005 Order. *Id*.

12. 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.[13]

13. 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.

December 15 Order

14. In the December 15 Order, the Commission found Midland's disconnection of the Sweckers' QF to be inconsistent with its obligations under PURPA.[14] The Commission reasoned[15] that, under section 210(a) of PURPA,[16] Midland has an obligation to purchase electric energy from QFs and to sell electric energy to QFs.[17]

15. The Commission explained that the available exemptions to the statutory purchase obligation are limited.[18] The first possible exemption is that a utility can be relieved of its QF purchase obligation under section 210(m) of PURPA, 16 U.S.C. § 824a-3(m) (2006).[19] The Commission concluded that this exemption is not at issue here, as Midland has not claimed relief under section 210(m) of PURPA, nor filed a petition seeking such relief pursuant to implementing sections 292.309 and 292.310 of the Commission's regulations.[20]

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[13] *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).

[14] December 15 Order, 137 FERC ¶ 61,200 at P 28.

[15] *Id.* PP 29-39.

[16] 16 U.S.C. § 824a-3(a) (2006).

[17] 18 C.F.R. § 292.303(a) (2012); 18 C.F.R. § 292.303(b) (2012); 18 C.F.R. § 292.303(c) (2012).

[18] December 15 Order, 137 FERC ¶ 61,200 at PP 32-37.

[19] Section 210(m) of PURPA is implemented through 18 C.F.R. §§ 292.309, 310 (2012).

[20] December 15 Order, 137 FERC ¶ 61,200 at P 32.

16. The Commission explained that a second possible exemption to the QF purchase obligation is contained in section 292.304(f)(1) of its regulations,[21] 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 id did not make such purchases, but instead generated an equivalent amount of energy itself."[22] The Commission stated[23] that 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 particular circumstances that can occur during light loading periods, in which a utility operating only base load units would be forced to cut back output from those units in order to accommodate the unscheduled QF energy purchases.[24] 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.[25] Section 292.304(f) of the Commission's regulations, when read in the context of the explanation in Order No. 69, thus applies only to such low loading scenarios, and cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons. [26]

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[21] 18 C.F.R. § 292.304(f)(1) (2012).

[22] *Id.* PP 33-35.

[23] *Id.* P 34.

[24] Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,870, 30,886 (1980).

[25] *Id*. at 30,886.

[26] The Commission further explained that 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 utility authorized to curtail the QF purchase unilaterally. December 15 Order, 137 FERC ¶ 61,200 at P 35.

17. The Commission thus concluded that section 292.304(f) of the Commission's regulations is inapplicable here.[27]

18. The Commission explained[28] that the third exemption from the obligation to purchase is contained in section 292.307(b) of the Commission's regulations,[29] which provides that a utility may, during a system emergency, discontinue purchases from a QF if such purchases would contribute to such emergency. Section 292.101(b)(4) of the Commission's regulations,[30] 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.

19. The Commission concluded that because Midland, by disconnecting the Sweckers' QF from its system, has effectively ceased purchases from the Sweckers' QF, and that, because its justification for the disconnection and cessation of purchases does not fall within any of the exemptions to the purchase obligation, Midland's disconnection of the Sweckers' QF is inconsistent with its purchase obligation under PURPA and our regulations.[31]

20. The Commission then addressed Midland's obligation to sell to the Sweckers' QF.[32] The Commission stated that the obligation to sell to a QF is comprehensive under PURPA and the implementing 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 but 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.[33] The Commission stated that, in either case, however, cessation of sales to a QF requires an application to the Commission. The Commission noted that Midland had not applied for relief from the obligation to sell to the Sweckers' QF, and

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[27] *Id.* PP 33-35.

[28] *Id.* P 36.

[29] 18 C.F.R. § 292.307(b) (2012).

[30] 18 C.F.R. § 292.101(b)(4) (2012).

[31] December 15 Order, 137 FERC ¶ 61,200 at P 37.

[32] *Id.* PP 38-39.

[33] 16 U.S.C. § 824(a)-3(m)(5) (2006); 18 C.F.R. § 292.312 (2012).

the Commission concluded that Midland still has the obligation to sell capacity and energy to the Sweckers' QF and that the disconnection is inconsistent with that obligation.[34]

21. Finally, the Commission noted that Midland has implied that the Commission, by issuing a notice of intent not to act in this proceeding, [35] has found that Midland is correct on the merits. The Commission explained that Midland is incorrect, and that, in issuing the notice of intent not to act, the Commission was not ruling on the merits of the dispute between the Sweckers and Midland.[36] The Commission also stated that, rather than having the Commission address the merits, the parties might prefer to attempt to settle the avoided-cost issue. The Commission directed the Commission's Dispute Resolution Service to convene the parties to see if assisted negotiations might result in an agreement. The Commission stated that, if the parties were unable to reach an agreement, or make progress towards an agreement, the Commission would then decide what steps it will take next in this proceeding.[37]

Requests for Rehearing

22. On January 17, 2012, the Iowa Utilities Board, NRECA, and Midland each filed a request for rehearing of the December 15 Order (with substantial overlap between the arguments made). On January 12, 2012, the American Public Power Association filed a motion to intervene out of time stating that the Commission's December 15 Order decision concerning disconnection was erroneous.

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[34] December 15 Order, 137 FERC ¶ 61,200 at P 38. The Commission, however, noted that while there could be circumstances where failure to pay a bill would justify disconnection, where the electric utility is being accused of violating PURPA any such disconnection should not occur without first following the Commission's regulations for authorization to be relieved of the obligation to sell to the QF. *Id.* P 39. The Commission concluded that disconnection was not justified here, 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. *Id.*

[35] *Id.* P 11 & n. 10 (citing *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)).

[36] *Id.* P 40.

[37] *Id.* PP 41-42.

23. On rehearing, the Iowa Utilities Board argues that the Commission, by ordering the Sweckers' electric service to be reconnected, has encroached into an area within the Iowa Utilities Board's jurisdiction. The Iowa Utilities Board argues that the avoided cost rate paid to the Sweckers has been the subject of prior litigation and should not be an issue in this proceeding. The Iowa Utilities Board states that Midland pays the required avoided cost rate to the Sweckers, which is the same rate that Midland pays to other QFs within its exclusive service territory; for Midland to pay a different rate, the Iowa Utilities Board argues, would violate the Iowa Utilities Board's nondiscriminatory standards. The Iowa Utilities Board also argues that the real dispute remaining in this case is not the avoided cost rate, but a dispute over bill payment, which it claims is within its exclusive jurisdiction. The Iowa Utilities Board concludes that the Sweckers should not be able to avoid disconnection of retail service for nonpayment of service by framing this as a PURPA dispute.[38]

24. NRECA argues that the Commission, in its December 15 Order, has attempted to amend its PURPA regulations to encompass disconnection of retail service for non-payment; NRECA claims that PURPA does not require utilities to seek prior approval to disconnect retail service, even to individual QFs, in non-payment situations.[39] NRECA argues that the Commission has no statutory jurisdiction over retail disconnection. NRECA argues that section 210(m) does not apply because (1) Midland was not seeking termination of the PURPA purchase obligation and (2) Midland was not seekigd to terminase tis PURPA(s)-9alse obligtsio(andic)-10ontsis to iffrs toselal tt the(S)1(weckea)-10(swho,g)]T
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based on the avoided cost rate and terms included in the 2004 Settlement Agreement and approved by the Commission, escalated pursuant to the terms of an Iowa District Court proceeding. Midland points out that, as recently as May 27, 2011, the Iowa Utilities Board rejected the Sweckers' attempt to reopen the previously litigated avoided cost determination. Midland also claims that the rate sought by the Sweckers is based on the rate at which Midland purchases power from its all requirements wholesale supplier, which Midland points out is inconsistent with long Commission precedent. Midland seeks clarification that the avoided-cost rate it pays the Sweckers is consistent with the Commission's avoided cost principles. Finally, Midland argues that the Commission erred in imposing an obligation on Midland to seek Commission approval of its disconnection; disconnection for failure to pay a retail bill is a retail matter that properly should be considered by the Iowa Utilities Board.

26. The Commission's Dispute Resolution Service, the Sweckers, and Midland each also filed status reports stating that they had been unable to settle the avoided cost rate issues raised by the Sweckers' petition to enforce PURPA. The Sweckers subsequently filed pleadings urging the Commission to find that a properly calculated avoided-cost rate should be based on the rate that Midland pays to its wholesale suppliers; the Sweckers also ask that the Commission require Midland to provide information concerning the rate it pays its suppliers and to set the issue of what the appropriate avoided cost should be for investigation and hearing. Finally, the Sweckers filed a response to the requests for rehearing.

Discussion

Procedural Matters

27. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. American Public Power Association has

Commission Determination

29. As discussed below, we deny NRECA and Midland's requests for rehearing. We also deny the Sweckers' renewed request that the Commission find that Midland's avoided cost must be based on the rate Midland pays its wholesale suppliers.[40]

30. The Iowa Utilities Board, NRECA and Midland argue that the Commission erred in finding that the disconnection should not have occurred without Midland's following the Commission's regulations for authorization to be relieved of the obligation to sell to the QF. They argue that disconnection of retail service is within the Iowa Utilities Board's jurisdiction, and not the Commission's. Nothing raised on rehearing convinces us that we erred in the December 15 Order in finding that Midland must seek Commission approval to disconnect the Sweckers.

31. As described in the December 15 Order,[41] under section 210(a) of PURPA,[42] Midland has an obligation to purchase electric energy from QFs and to sell electric energy to QFs. Nothing raised in the requests for rehearing convinces us that, by disconnecting the Sweckers, Midland has not in effect terminated, at least on a temporary basis, its obligation to buy from and sell to the Sweckers.[43] Nor are we convinced that a termination, even a temporary termination, may be accomplished other than by following this Commission's rules for termination.

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[40] As discussed below, Midland purchases from two wholesale suppliers, one serving part of Midland's service territory, and the other serving the remaining part of Midland's service territory. *See* note 58 *infra.*

[41] December 15 Order, 137 FERC ¶ 61,200 at PP 29-31.

[42] 16 U.S.C. § 824a-3(a) (2006).

[43] That is, we see little if any distinction in practice between disconnection and termination. While the former is claimed to be temporary, it can also be permanent in practice. And while the latter is claimed to be permanent, because our regulations allow for subsequently undoing a termination, *see* 18 C.F.R. § 292.313 (2012), it can also be temporary in practice. In short, cessation of service to a QF – whether called one or the other – is still cessation of service no matter how it is denominated.

32. Prior to the Commission's implementation of section 210(m) of PURPA,[44] which was added to PURPA by EPAct 2005, the Commission, as Midland points out, in practice left issues regarding disconnection of QFs for nonpayment of bills to state regulatory authorities or nonregulated utilities.[45] In implementing EPAct 2005, however, the Commission addressed, and provided specific regulations on, how an electric utility may terminate its obligations to purchase from and sell to QFs. [46]

33. The issue, moreover, is not so simple as the parties seeking rehearing suggest; it involves more than just a retail customer not paying its bills for retail service. While the Sweckers take retail service from Midland and such retail service is normally beyond our jurisdictional reach, that is not the end of the matter. The Sweckers also have a QF, and service to that QF pursuant to PURPA – interconnecting with and both buying from the QF and selling to the QF – can only be disconnected in very limited circumstances, as described in our earlier December 15 Order and here. PURPA does not allow service to a QF to be disconnected unilaterally by and at the sole discretion of the interconnected purchasing/selling electric utility (here, Midland), merely because that electric utility also

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[44] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

[45] *Gregory Swecker v. Midland Power Coop.*, 87 FERC ¶ 61,187, at 61,722 (1999). Midland also cites to the 2006 Order, *Gregory Swecker v. Midland Power Coop.*, 114 FERC ¶ 61,205 at P 6, *order denying reconsideration*, 115 FERC ¶ 61,084 (2006), as holding that disconnection was not a matter within its jurisdiction. Midland suggests that the 2006 Order's statement concerning jurisdiction was made after enactment of EPAct 2005 and thus binds the Commission. However, the language referenced by Midland is in the historical background section of that order reciting in summary fashion the prior history of the Swecker/Midland dispute (citing to *Gregory Swecker v. Midland Power Coop.*, 87 FERC at 61,722); it was not intended to be a holding on the then jurisdiction over disconnection. *Boston Edison Co.*, 101 FERC ¶ 61,068, at P 9 n.4 (2002); *Southern Co. Services, Inc.*, 57 FERC ¶ 61,284, at 61,929 (1991). Moreover, the 2006 Order was issued prior to the Commission's implementation of section 210(m) of PURPA in Order No. 688; the rules concerning termination of the obligations to purchase from and sell to QFs thus issued after the 2006 Order. The 2006 Order thus does not reflect the Commission's understanding of how EPAct 2005 affects an electric utility's right to disconnect a QF.

[46] And our affirmative grant of relief under PURPA section 210(m) does not relieve an electric utility of its obligation to interconnect with a QF – only the obligation to purchase from and sell to the QF.

happened to be selling retail service. When the two services are so intertwined physically that disconnection of one cannot be done without disconnection of the other, as is the case here,[47] the requirements of PURPA and our implementing regulations must prevail over the proposed unilateral action of the interconnected purchasing/selling utility. In the December 15 Order, the Commission thus held that disconnection, in the circumstances presented here, may not occur without following the Commission's regulations for authorization to be relieved of the obligation to sell to a QF.[48] The 2004 Settlement noted by NRECA includes a discussion of disconnection for failure to pay having to be consistent with applicable state law and Iowa Utilities Board regulations. Although this 2004 Settlement was approved by the Commission, Congress subsequently passed EPAct 2005 which clarified the Commission's jurisdiction over the mandatory purchase and sales obligations. Therefore, to allow the 2004 Settlement to control would be inconsistent with our obligations under PURPA, and the Commission's regulations.[49]

34. The Commission acknowledged that there may be circumstances where failure to pay a bill would justify disconnection.[50] The Commission further stated that in the case before us, however, where the Sweckers have indicated that they intend to pursue the matter in Federal court, the Commission did not believe disconnection was justified, but rather disconnection must wait for the conclusion of the Sweckers' enforcement action under PURPA, including the conclusion of any petition for enforcement filed in Federal court. Disconnection is not justified until the Sweckers have had a chance to fully litigate the payment dispute with Midland.

35. As we discuss below, the Commission reaffirms that it will exercise its discretion, and not itself initiate an enforcement proceeding in Federal court; while this action ends the dispute over avoided costs before the Commission, the Sweckers still have a statutory right themselves to take the dispute to court. Accordingly, upon conclusion of any Federal court proceeding brought by the Sweckers to enforce PURPA, the Commission will consider a petition to allow disconnection of the Sweckers from Midland for nonpayment.

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[47] *Cf.* Midland Rehearing at 2 (Midland's service to the Swecker's farm and residence "also provides back-up power to their QF").

[48] December 15 Order, 137 FERC ¶ 61,200 at P 39.

[49] 18 C.F.R. §§ 292.309-310, 292.312 (2012).

[50] *Id.* We see no inconsistency between requiring Midland to first follow the Commission's rules for terminating its obligation to sell to the Sweckers and the provision in the 2004 Settlement Agreement which permits disconnection for nonpayment of bills.

36. The remaining issue concerns the proper calculation of avoided costs and whether the Commission should go to court to enforce PURPA.[51] Midland, NRECA and the Iowa Utilities Board ask the Commission to declare that the avoided-cost rate currently being paid the Sweckers is consistent with PURPA. The Sweckers in turn ask that the Commission set up procedures to determine what rate Midland pays its wholesale supplier and to declare that Midland's avoided-cost rate should be based on what Midland pays its full-requirements wholesale supplier.[52] We find no merit in the Sweckers' contention that Midland's avoided cost must be the price at which Midland purchases power from its supplier, rather that supplier's avoided cost (which Midland states that it is using as its avoided cost). In Order No. 69,[53] the Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements customer's supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this approach.[54] Given that the rate the Sweckers seek is inconsistent with our precedent, we see no reason why we should initiate an enforcement proceeding on behalf of the Sweckers to establish an avoided-cost rate methodology inconsistent with our precedent. Moreover, the rate that Midland currently pays the Sweckers is the rate that

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[51] As noted above, the Commission has previously, in this proceeding, declined to initiate an enforcement proceeding in response to the Sweckers' petition. *See supra* note 11.

[52] Midland was formed by the consolidation of two rural electric distribution cooperatives, Green County Rural irate sho

the Sweckers agreed to in the 2004 Settlement Agreement —a settlement approved by the Commission.[55] Our regulations provide that nothing in the Commission's regulations limits the authority of any electric utility and QF to agree on their own to an avoided-cost rate, and nothing affects the validity of any contract entered into between an electric utility and a QF.[56] The Commission in implementing this regulation stated that the regulation recognizes that the fact that a QF entered into a contract with an electric utility at an agreed-to rate indicates that a higher rate would be unnecessary to encourage the development of the QF.[57] We therefore see no reason why we should go to court based on the Sweckers' petition to enforce PURPA.[58] We accordingly affirm our previous decision in this docket to not go to court to enforce PURPA based on the Sweckers' petition; the Sweckers thus may themselves go to court should they wish to do so.

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

[56] 18 C.F.R. § 292.301(b) (2012).

[57] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,867-68. Midland makes inconsistent statements in the record as to whether the 2004 Settlement is binding. Our findings do not rest on whether the 2004 Settlement is binding, but on the fact that the 2004 Agreement is evidence that the parties agreed to a rate and that a higher rate thus would be unnecessary to encourage the development of the QF.

[58] The Commission has, more generally, emphasized that it considers stability and regulatory certainty an important concern. For the sake of stability and regulatory certainty, the Commission has indicated that a contract is not to be lightly revised. *See Rail Splitter Wind Farm, LLC v. Ameren Services Company and Midwest Independent Transmission System Operator, Inc.*, 142 FERC ¶ 61,047, at PP 31-32 (2013). Even if we assume that the Sweckers' decision to sign the 2004 Settlement Agreement required Midland to pay significantly less for the Sweckers' excess energy than it could have paid under a differently calculated avoided-cost rate, it appears that the difference between the 2004 Settlement Agreement's rate and what the Sweckers claim they were entitled to was insufficient to dissuade the Sweckers from executing the 2004 Settlement Agreement, and is equally insufficient now to persuade us to initiate our own enforcement proceeding.

The Commission orders:

The requests for rehearing are hereby denied, and we reaffirm our earlier notice of intent not to act, as discussed in the body of this order.

By the Commission. Commissioner Norris is concurring with a separate statement attached.
Commissioner Clark is dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gregory R. Swecker and Beverly F. Swecker Docket No. EL11-39-002

v.

Midland Power Cooperative and State of Iowa

(Issued March 21, 2013)

CLARK, Commissioner, *dissenting in part*:

Today's order addresses several requests for rehearing of a prior Commission decision[1] involving Midland Power Cooperative's (Midland) obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA).[2] Petitioners generally raise two main issues: (1) whether Midland Power Cooperative's avoided cost payments to Gregory R. Swecker and Beverly F. Swecker are consistent with PURPA; and (2) whether it was appropriate for the Commission to order reconnection of the Sweckers' facilities following disconnection of its retail electric service. On the first issue, I agree with the finding in today's order that it would be inappropriate to initiate an enforcement proceeding on behalf of the Sweckers to establish a higher avoided cost payment for their qualifying facility (QF). Granting the Sweckers' request would result in a deviation from established Commission practice[3] and would be inconsistent with

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[1] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200 (2011) (December 15 Order).

[2] 16 U.S.C. § 824a-3 (2006).

[3] *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30871. *See also, e.g., Roger & Emma Wahl v. Allamakee-Clayton Electric Cooperative,* 115 FERC ¶ 61,318 at P 10, *order denying reconsideration,* 116 FERC ¶ 61,134 (2006); *City of Longmont,* 39 FERC ¶ 61,301 at 61,974 (1987); *Carolina Power & Light Co.,* 48 FERC ¶ 61,101 at 61,390 (1989); *North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company,* 72 FERC ¶ 61,263 at 62,172 (1995).

the settlement between the Sweckers and Midland,[4] which was approved by this Commission in 2004.[5] For these reasons, I support the order in part.

However, I cannot support the decision to uphold the Commission's prior order requiring reconnection of the Sweckers' QF. First, termination of the Sweckers' QF service arose consequentially from the disconnection of retail service, which was caused by the Sweckers' nonpayment for service provided by Midland. The Iowa Utilities Board has jurisdiction of the retail service and disconnection. The Board concludes that the Sweckers should not be able to avoid disconnection and payment for services by framing this as a PURPA dispute. I agree. While our PURPA regulations obligate electric utilities to provide QFs service, they do not give us jurisdiction over retail disconnection. Second, the 2004 Settlement Agreement signed by the Sweckers, and approved by the Commission, provides Midland with explicit authority to disconnect the Sweckers' facilities after sufficient notice and in accordance with applicable state law and Iowa Utilities Board regulations.[6] Accordingly, I would have deferred to the Iowa Utilities Board's jurisdiction over this matter instead of asserting Commission jurisdiction under PURPA.

For these reasons, I respectfully dissent in part from this order.

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Tony Clark, Commissioner

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[4] Docket No. EL03-53-000, Midland Power Cooperative Explanatory Statement in Support of Settlement and Request for Relief, Attachment 2 (Agreement for Electric Service to a Qualifying Facility and for Purchase of Surplus Demand and Energy from a Qualifying Facility) (2004 Settlement Agreement).

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

[6] *See* section 9 of the 2004 Settlement Agreement.